

THE ADMINISTRATION OF JUSTICE IN THE ANANGU PITJANTJATJARA
YANKUNYTJATJARA (APY) LANDS: A FRONT LINE IN TENSIONS BETWEEN
TRADITIONAL ABORIGINAL CULTURE AND THE CRIMINAL LAW

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CHAPTER 1: THESIS INTRODUCTION

ABSTRACT

The administration of justice in the Anangu Pitjantjatjara Yankunytjatjara (APY) Lands, particularly issues related to policing practices, the conduct and operation of the APY Court circuit, and the legal representation provided to APY people (Anangu), has received little academic attention. This thesis outlines the socio-demographics of this remote South Australian region where semi-traditional Anangu lifestyles are still governed by *Tjukurpa* (Anangu Dreaming). Issues related to the tensions existing between traditional Aboriginal culture and the South Australian criminal law are identified and critically examined through the lenses of Indigenous sovereignty and legal pluralism. The identified issues have revealed themselves through a combination of prior personal experience, literature reviews, surveys conducted with members of the judiciary and lawyers who have had recent experience in the APY Court circuit; and importantly, personal interviews with Anangu living within the region.

Although the number of interviewees is modest and thus only of qualitative value, they nevertheless offer valuable personal and social insight into how justice is administered in the APY Lands. An overarching theme of this research is that recognition and acknowledgement of Anangu culture and language are consistent with a degree of Indigenous self-determination. While official government policies recognise the importance of Aboriginal culture and language, the research reveals a failure to implement practices consistent with them.

The present justice system in the APY Lands largely ignores restorative justice despite it being a hallmark of Anangu culture. There has been little or no consultation between criminal justice agencies and Anangu, particularly regarding policing practices and the layout and conduct of APY Courts. This has culminated in a lack of community understanding or acceptance of the criminal justice system, first implemented in 1836 when South Australia was settled.

The thesis concludes with a range of evidence-based recommendations for change to the practices of policing and the administration of justice that are oriented towards greater cultural awareness, and an appreciation of the importance of Anangu sovereignty.

DECLARATION OF ORIGINALITY

I, Peter Gilbert Whellum, hereby certify that this work contains no material which has been accepted for the award of any other degree or diploma in any university or other tertiary institution.

To the best of my knowledge and belief, it contains no material previously published or written by another person, except where due reference has been made in the text. In addition, I certify that no part of this work will, in the future, be used in a submission for any other degree or diploma in any university or other tertiary institution without the prior approval of the University of Adelaide and where applicable, any partner institution responsible for the joint-award of this degree.

I give consent for this copy of my thesis, when deposited in the University Library, being made available for loan and photocopying, subject to the provisions of the *Copyright Act 1968* (Cth).

I also give permission for the digital version of my thesis to be made available on the Internet, via the University's digital research repository, the Library catalogue and also through Internet search engines, unless permission has been granted by the University to restrict access for a period of time.

I acknowledge the support I have received for my research through the provision of an Australian Government Research Training Program Scholarship and the financial support provided by the Zelling-Gray Postgraduate Scholarship from 2016.

Peter Gilbert Whellum

Date: 24 August 2018

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Throughout my candidacy I have been fortunate in having supportive friends in Dr David Wescombe-Down and Frances Cassar. Emma Ziersch, then a Senior Research and Evaluation Officer with the Office of Criminal Statistics and Research (OCSAR), was only too willing to provide me with vital statistics relating to the operation of the APY Courts. My research involved three separate field trips to the APY Lands to interview Anangu participants. These visits to such a remote area of South Australia would not have been possible at all without the invaluable assistance of my son Nathan, Alex Reilly and Amanda Nettelbeck, and Ross King. I sincerely thank all who were willing participants in my surveys: APY Lands Anangu, members of the judiciary and legal practitioners. A special thanks to my old *malpa* (friend) at Ernabella, Donald Fraser.

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GLOSSARY OF TERMS

ABS	Australian Bureau of Statistics
ACPO	Aboriginal Community Police Officer in the Northern Territory
AJO	Aboriginal Justice Officer (Courts Administration Authority)
Aboriginal Land Rights Act 1976	<i>Aboriginal Land Rights (Northern Territory) Act 1976</i> (Cth)
ALRC	Australian Law Reform Commission
ALRM	Aboriginal Legal Rights Movement Inc (South Australia)
Anangu	People or body (Pitjantjatjara and Yankunytjatjara)
APY	Anangu Pitjantjatjara Yankunytjatjara
APY Court/ APY Circuit	APY Magistrates Circuit Court — part of the jurisdiction of the Port Augusta Magistrates Court
APY Lands/ the Lands	Anangu Pitjantjatjara Yankunytjatjara (APY) Lands — the 103 000 square kilometre area of land in the north-west of South Australia so designated under the <i>Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981</i> (SA)
APY Land Rights Act	<i>Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981</i> (SA)
ATSI	Aboriginal and Torres Strait Islanders
ATSIC	The now defunct Aboriginal and Torres Strait Islander Commission
CAA	Courts Administration Authority (South Australia)

CDEP	Community Development Employment Projects — a now defunct Commonwealth Government ‘work for the dole’ initiative
DCS	Department for Correctional Services (South Australia)
DCSI	Department for Communities and Social Inclusion (South Australia)
DECD	Department for Education and Child Development
Aboriginal Affairs and Reconciliation Division	Department of the Premier and Cabinet Aboriginal Affairs and Reconciliation Division (South Australia)
FIFO	Fly-in / fly-out workers
GDLP	Graduate Diploma of Legal Practice
HDR	Higher Degrees by Research
HREC	Human Research Ethical Committee — University of Adelaide
ICCPR	International Covenant on Civil and Political Rights
LLB	Bachelor of Laws degree
LLM	Master of Laws degree
Legal Aid	Legal Services Commission of South Australia
MDMA/Ecstasy	3,4-methylenedioxy-methamphetamine – ‘ecstasy’ or ‘molly’
NAATI	National Accreditation Authority for Translators and Interpreters

NPY Lands	Ngaanyatjarra, Pitjantjatjara, Yankunytjatjara Lands meaning Anangu cultural lands extending across SA, WA and the NT.
NPY people	Ngaanyatjarra, Pitjantjatjara and Yankunytjatjara people
NPY Women's Council	Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council
NTA	<i>Native Title Act 1993</i> (Cth)
NTAIS	Northern Territory Aboriginal Interpreter Service
OCSAR	Office of Crime Statistics and Research (South Australia)
PALO	Police Aboriginal Liaison Officers (SAPOL)
PY Ku	A network of buildings on APY communities used as transaction centres for interactions with various government authorities
RCMP	Royal Canadian Mounted Police
RFDS	Royal Flying Doctor Service
SAPOL	South Australia Police (formerly SA Police Department)
UNISA	University of South Australia

PITJANTJATJARA AND YANKUNYTJATJARA WORDS¹

<i>Anangu</i>	People or body — the Pitjantjatjara and Yankunytjatjara refer to themselves as <i>Anangu</i>
<i>ini</i>	A person's name
<i>inma</i>	Traditional ceremony
<i>kulpi tjukutjuku</i>	Small cave
<i>Kunmanara</i>	One whose name I cannot say (name not to be spoken, or no name) — Kunmanara is used to avoid using the first name of a deceased person who has the same name as a living person
<i>kunta / kuntaringanyi</i>	Shame / feeling shame
<i>malpa</i>	Friend
<i>ngananya</i>	Who
<i>ngapartji ngapartji</i>	In turn, in turn (exchange or reciprocity), an important aspect of <i>Anangu</i> culture
<i>nyaa</i>	What?
<i>nyuntu / nyuntumpa</i>	You / yours (possessive)
<i>pampa</i>	Senior or older <i>Anangu</i> woman
<i>raipula</i>	Rifle
<i>rapita</i>	Rabbit
<i>tjilpi</i>	Senior or older <i>Anangu</i> man
<i>titja</i>	Teacher
<i>tjitja</i>	Nursing sister
<i>tjitji</i>	Child

¹ Paul Eckert, *Pitjantjatjara / Yankunytjatjara Picture Dictionary* (IAD Press, 2007); see also Michael Walsh and Colin Yallop, *Language and Culture in Aboriginal Australia* (Aboriginal Studies Press, 2012).

<i>Tjukurpa</i>	An <u>u</u> ngu Dreaming (traditional customs and law). In some academic texts <i>tjukurrpa</i> may be used, indicating its ‘rolled r’ pronunciation
<i>wapatju</i>	Father-in-law
<i>warkinyi</i>	Profanity (swearing)
<i>wati</i>	A ritually-inducted An <u>u</u> ngu man

MAP OF THE AṆANGU PITJANTJATJARA YANKUNYTJATJARA (APY) LANDS OF SOUTH AUSTRALIA

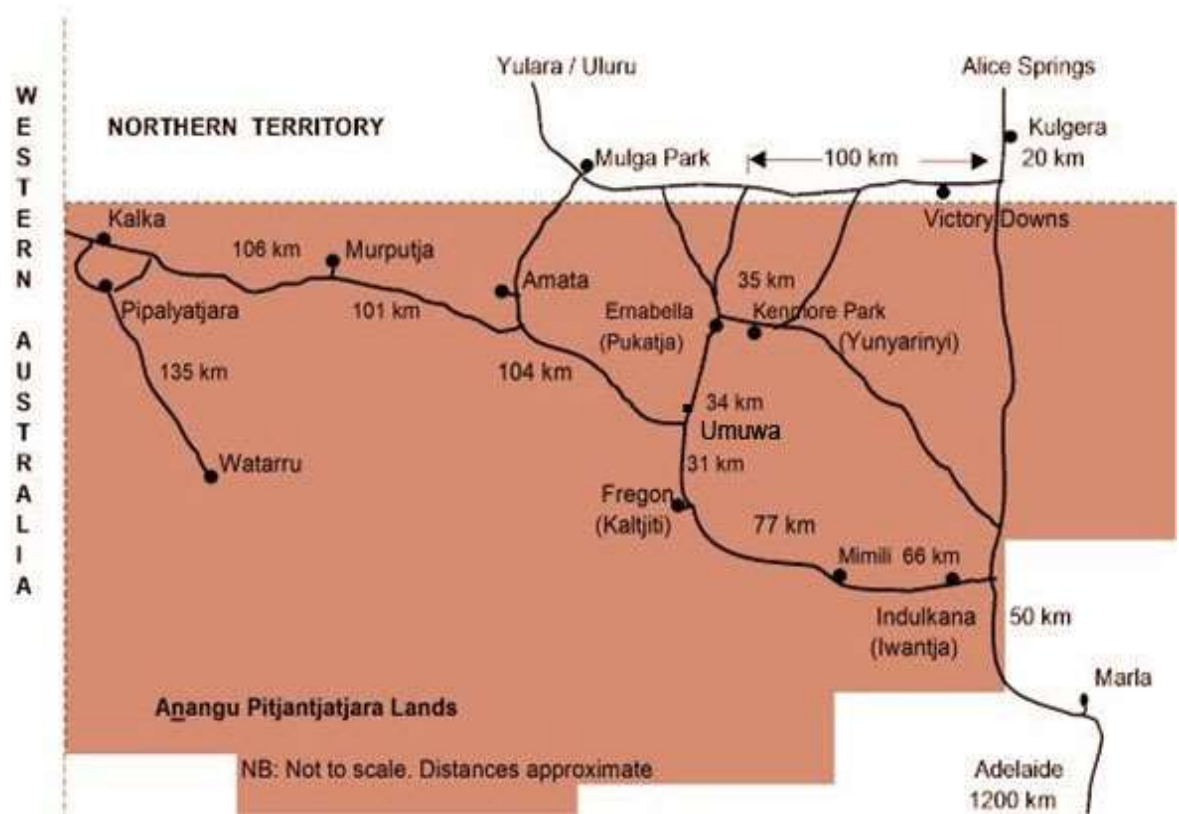
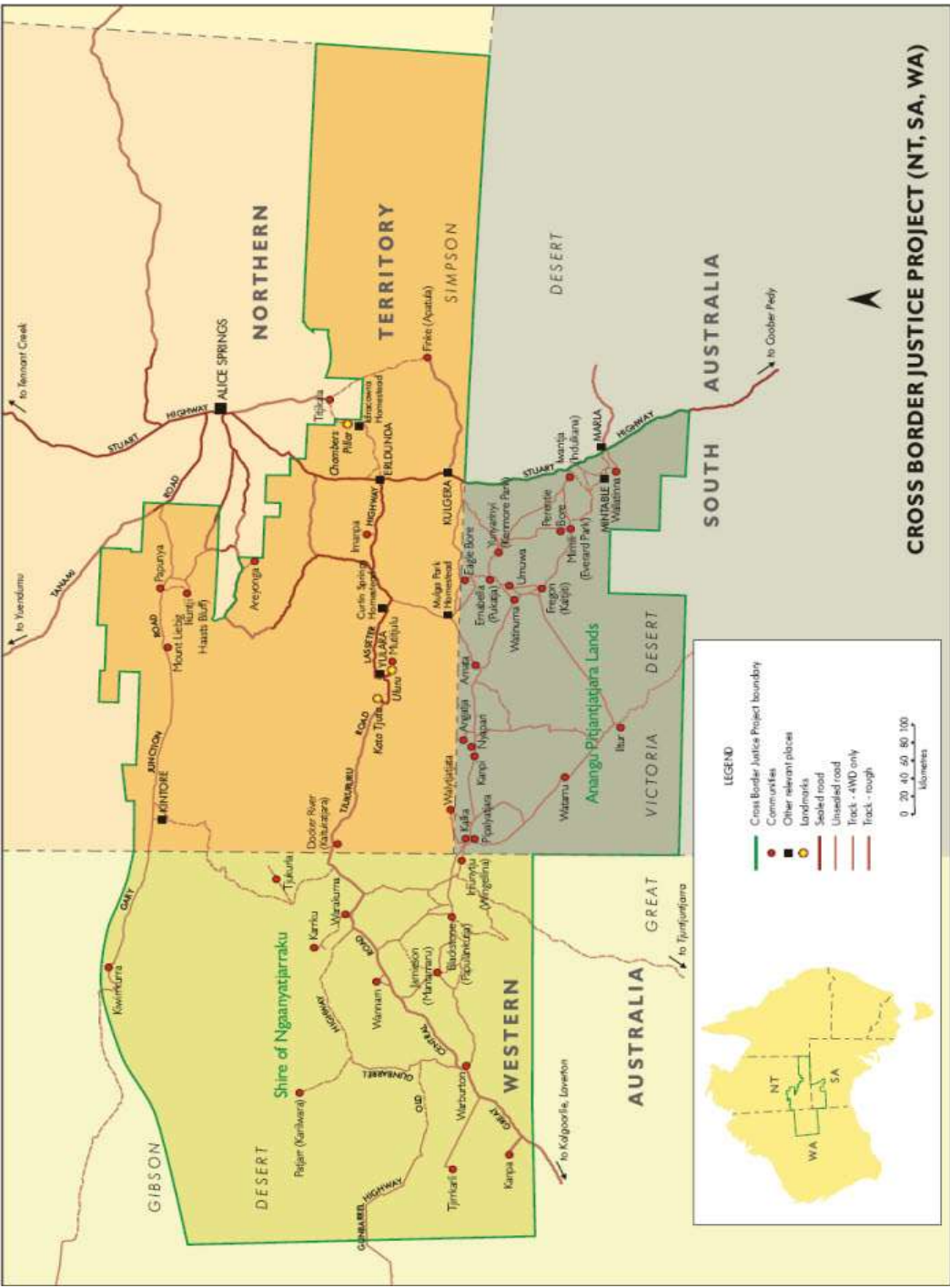


Figure 1.1: Map of the South Australian Aṇangu Pitjantjatjara Yankunytjatjara (APY) Lands²

² © Aṇangu Education Services <<http://www.aeseo.sa.edu.au/images/map.jpg>>; see Appendix 4A for written permission to use this map.

MAP OF THE NGAANYATJARRA PITJANTJATJARA YANKUNYTJATJARA LANDS OF SA, NT AND WA



Prepared by Ronisco Graphics, April 2004

Figure 1.2: Map of the Ngaanyatjarra Pitjantjatjara Yankunytjatjara Lands of SA, NT and WA. © NT Government³

³ © Northern Territory Government <<https://nt.gov.au/law/crime/cross-border-justice>>; see Appendix 4B for written permission to use this map.

I INTRODUCTION

The Anangu Pitjantjatjara Yankunytjatjara (APY) Lands, located in the remote north-west corner of South Australia, is owned as inalienable freehold by Pitjantjatjara and Yankunytjatjara Aboriginal people (Anangu) under the legislative provisions of the *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act* (APY Land Rights Act).⁴ Its 103 000 square kilometre expanse represents nearly ten per cent of South Australia's land area and is home to approximately 1905 Anangu.⁵ Culturally, the APY Lands forms part of the nearly 400 000 square kilometre area occupied by Anangu within the contiguous areas of south-west Northern Territory and central-west Western Australia, collectively referred to as the Ngaanyatjarra Pitjantjatjara Yankunytjatjara (NPY) Lands. APY Lands people still practice semi-traditional lifestyles, governed by the ancient laws of *Tjukurpa* (the Dreaming).

APY Lands Anangu remained isolated compared with most other Indigenous groups.⁶ William Goss and Ernest Giles are reported to have been the first non-Indigenous explorers to pass through the region in 1873, followed by survey expeditions between 1888 and 1892.⁷ The first contact with the criminal justice system did not occur until after the Oodnadatta police station was established on the Adelaide to Alice Springs railway line in 1891. Even then, contact with police would have been spasmodic until a police camp was established in 1915 near the present-day APY Lands community of Indulkana (Iwantja), approximately 200 kilometres west of Oodnadatta. With the closure of this police camp in 1920, the responsibility for policing the north west fell to officers stationed at Oodnadatta who conducted patrols by camels across their vast police district, extending from the Queensland to the Western Australian borders.

⁴ *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA).

⁵ Australian Bureau of Statistics, *2016 Community Profiles, APY Lands - Aboriginal and Torres Strait Islander Peoples Profile* <http://www.censusdata.abs.gov.au/census_services/getproduct/census/2016/communityprofile/406021138?opendocument>; note that Anangu population figures vary in later chapters of this thesis due to differences between the more expansive data shown in the 2011 ABS census and those contained in the ABS census of 2016. A further explanation for varying population figures is that Anangu are more mobile and travel widely throughout not only the NPY Lands but also to southern regions of SA and elsewhere.

⁶ John Summers, 'The Future of Indigenous Policy on Remote Communities' (Paper presented at the Australasian Political Studies Association Conference University of Adelaide, Adelaide 29 September – 1 October 2004) 5–6.

⁷ W H Edwards, 'Patterns of Aboriginal Residence in the North-west of South Australia' (1992) 30 (December) *Journal of the Anthropological Society of South Australia* 2, 6.

Official reports of that era expressed concerns regarding further development of pastoral areas in the north-west and the extinction of Aboriginal people in this region,⁸ despite the fact, by virtue of their remoteness, they were protected from ‘the major effects of contact ... during the first century of European settlement.’⁹ These protectionist concerns culminated in 1920 with the establishment of a 56 721 square kilometre area west of Ernabella (Pukatja) to the Western Australian border being proclaimed as the North West Aboriginal Reserve.¹⁰

Policing of the Reserve continued sporadically until 1976 when staffing levels at Oodnadatta increased to six officers and small police stations were established at Indulkana, Ernabella and Amata. Weekly, five-day patrols to the Reserve were conducted by Oodnadatta police. Until that time, any Anangu offenders arrested were taken to Oodnadatta to appear before the Oodnadatta Court of Summary Jurisdiction to be dealt with summarily, or for serious indictable matters, remanded in custody and transported by rail to the Port Augusta Supreme Court Circuit. From about 1976, Magistrates Circuit Courts commenced hearing criminal matters at major Reserve communities every four months.¹¹ When the responsibility for policing what is now the APY Lands moved to a new police station at Marla in 1984, similar vehicular patrols were continued until a permanent police presence was established within the Lands in 2008 on a fly-in, fly-out (FIFO) basis from Adelaide.

The purpose of this thesis is to examine the administration of justice in the APY Lands, particularly from 1976 until the present time. It identifies and examines issues relating to policing practices, the operation of the APY Court and the provision of legal representation to Anangu in relation to criminal law matters before the APY Court. This examination is conducted through the lenses of sovereignty and legal pluralism, highlighting issues in this remote region which is seen as a front line in the tensions between traditional Aboriginal culture and the criminal law. The results of my research

⁸ Summers, above n 6, 5-6.

⁹ Edwards, above n 7, 2.

¹⁰ See Edwards, above n 7, 7; see also *Aborigines Act 1911* (SA) s 14 — the statutory authority for proclaiming areas of Crown Land as a reserve for Aboriginal people.

¹¹ See, eg, Garry Hiskey, ‘The North West Court Circuit (Pitjantjatjara Lands: A Personal Perspective’ (circa 1992) *Aboriginal Justice Issues* 151, 159; see also Judith Worrall, ‘European Courts and Tribal Aborigines - a Statistical Collection of Dispositions from the North-West Reserve of South Australia’ (1982) 15 (March) *Australian and New Zealand Journal of Criminology* 47, 48.

expose not only an inadequate understanding and appreciation of the challenges posed by specific cultural needs of APY Anangu but also a more fundamental dysfunction in the system of justice imposed in the Lands. The current system is impersonal, results-driven and lacking in cultural sensitivity. This thesis argues that the system itself needs a paradigmatic shift in thinking. It identifies and examines some possible solutions to these problems, drawing upon relevant examples from three other common law jurisdictions, New Zealand, Canada and the USA.

The genesis of my interest in legal issues affecting the APY Lands and its Anangu residents can be traced back to 1978 when, as part of my employment as a sworn South Australia Police (SAPOL) officer, I was posted to the Oodnadatta police station as the second officer in charge.¹² At that time, weekly five-day patrols of the then North West Aboriginal Reserve were the responsibility of the six officers stationed at Oodnadatta. A posting in 1985 as the senior sergeant in charge of the new Marla police station, where I was responsible for providing weekly patrols to the newly proclaimed APY Lands as well as duties as police prosecutor, further confirmed my interests in issues associated with the administration of justice in the region. Twenty-five years later I commenced undergraduate law studies, which provided an opportunity to revisit many of the issues I faced as a police sergeant on the Lands from a legal perspective, eventually leading to this project. As part of my practical legal training towards a Graduate Diploma of Legal Practice (GDLP) with the Australian National University, I worked for the Aboriginal Legal Rights Movement (ALRM) at Port Augusta in 2014–15. My legal training involved a visit to the APY Lands during a four-day APY Court Circuit in March 2015.

My research revealed that while much has been written about the history, socioeconomics, culture and language of the APY Lands and its people, there is a dearth of information about the administration of justice, particularly so from a non-Aboriginal perspective informed by the views of Anangu. My approach to the research is innovative in a number of ways. In particular, my unique position as a police officer on the Lands and as a legal practitioner many years later, provide a foundation for the empirical research conducted in the thesis. I combine my own experience with a legal

¹² At that time SAPOL was called the South Australian Police Department (SAPD).

historical focus and a theoretical framing around the concepts of sovereignty and legal pluralism.

II RESEARCH METHODOLOGY

A qualitative approach to my research was chosen as it enabled me to view the issues in the larger context of their historical and socio-legal dimensions. The quantitative data, in the form of interviews, is not statistically significant but the information they contain deepens an understanding of the administration of justice on the APY Lands at the experiential level.¹³

The issues identified have resulted from empirical evidence in the form of interviews with Anangu conducted by me in 2016 and by surveying magistrates and legal practitioners who have served recently in the Lands. Other issues have been identified from the available literature, personal visits to the APY Courts during 2015 and 2016, and from my earlier policing and prosecution experiences in the APY Lands. The fact that the period under study is relatively recent means that this personal experience and the interviews provide a comprehensive view of practice over time.

A *Empirical Research*

All interviews were conducted with the approval of the University of Adelaide's Human Research Ethical Committee (HREC) — approval No. H2015-220 (see Appendix 2). I was fortunate to have a prior personal connection with many Anangu and a sound knowledge of the Lands, important factors in knowing the types of questions to ask and in identifying the key issues to be investigated. Any potential bias presented as a result of my familiarity with the Lands and its people have been negated by the fact there has been a 28-year gap between my 2016 interviews with Anangu and the last time I visited the region at the completion of my Marla police posting in 1988. Having ceased my police career in 1989, my objectivity was not impeded; rather it has allowed me to view the identified issues through fresh eyes. Moreover, during my research, I was conscious

¹³ Andrew Knight and Les Ruddock, (eds), *Advanced Research Methods in the Built Environment* (Wiley-Blackwell, 2008) 37.

of the need to avoid preconceptions of the issues being investigated. My approach has also been complemented by the available literature.

Written permission to conduct the research and to travel throughout the Lands was granted by the APY Executive Council in March 2016. Interviews were conducted with 32 Anangu during three separate visits to the APY Lands in that year. All participants were volunteers and were Anangu residents of the Lands over the age of 18 years with an equal number of males and females. Although the number of interviewees is small, it needs to be understood in the context of the small sample size available. In 2016, there were 1320 Anangu aged 18 years and older, representing 69 per cent of the total APY Lands Anangu population of 1905 people.¹⁴ Those interviewed represent 2.4 per cent of the adult population of the region. Respondents included senior community leaders having a long historical familiarity with the relationship between the criminal law and Anangu culture. Although the services of an interpreter were available it was not required as I have an elementary understanding of the Pitjantjatjara and Yankunytjatjara languages and an appreciation of the challenges associated with interviewing Anangu who speak English as a second language. Participants were chosen from the major APY communities of Pipalyatjara, Amata, Ernabella, Fregon and Mimili. Permission was sought from, and assistance was provided by the chairpersons of each community visited. Time constraints prevented interviews with Anangu living at Indulkana (Iwantja). The interviews reveal the social dimensions for the overall research picture from an Anangu perspective — although not being statistically significant, the results offer a set of first-hand experiences and views of the operations of the criminal justice system on the Lands.

I also interviewed three magistrates with current or recent experience in presiding over APY Courts. The total number of magistrates with such experience is only four. These interviews provide personal accounts but also offer a sense of their understanding and perception of Anangu culture. Sixteen lawyers were selected as being practitioners with current or recent experience representing Anangu clients before the APY Court. Of the 16 identified, eight lawyers responded and were surveyed.

¹⁴ Australian Bureau of Statistics, above n 5.

Although HREC approval was granted to interview/survey SAPOL members serving on the Lands, a request to SAPOL's Research Committee was made but declined. This attempt echoes Professor Rick Sarre's experience where he reported 'a dearth of publicly available data on police policies ... [with] the desire of some police organisations to keep relevant information "in house"'.¹⁵ Consideration was given to acquiring information under a *Freedom of Information Act*¹⁶ application but was not pursued as most internal police policies are contained within SAPOL General Orders, which are not classed as subordinate legislation and therefore unavailable to the public.¹⁷ Although permission was not forthcoming from SAPOL, information about policing on the Lands was available from other sources, including the available literature, personal observations, interviews with Anangu, magistrates and lawyers, and my previous personal experiences as a sworn police officer.

B Statistical Data

Statistical information regarding cases before APY Courts were obtained from Port Augusta court lists in my possession, Port Augusta Court Aboriginal Justice Officers (AJOs) and from data supplied by the South Australian Office of Crime Statistics and Research (OCSAR). Other statistical data has been extracted from the available literature, including historical data compiled by Judith Worrall in 1982 and by former magistrate Garry Hiskey in 1992.¹⁸ Valuable contemporary data was obtained from APY Court lists for 2014 to 2016, obtained during various visits to the Lands during that time. Unfortunately, a longitudinal and comparative statistical study from the late 1970s to 2016 is not possible due to the inconsistency of available data.

C Literature Review

As mentioned, there is a paucity of literature relating to the major theme of this thesis, the tensions between traditional Aboriginal culture and the criminal law in the APY Lands of South Australia from a non-Aboriginal perspective informed by the views of Anangu. As these tensions are being examined through the themes of sovereignty and

¹⁵ Rick Sarre, 'Firearms Carriage by Police In Australia' (Criminology Research Council, May 1996) 6.

¹⁶ *Freedom of Information Act 1991* (SA).

¹⁷ *Subordinate Legislation Act 1978* (SA); *Police Act 1998* (SA) s 11(3)(b).

¹⁸ Worrall, above n 11; Hiskey, above n 11.

legal pluralism, a summary of the available literature referred to in chapter 2 provides a logical starting point.

Chapter 2: Sovereignty and Legal Pluralism

Through the lenses of sovereignty, status and self-determination, Paul McHugh's expansive textbook, *Aboriginal Societies and the Common Law*,¹⁹ provided a comprehensive history of Anglo-Aboriginal encounters with the common law in North America and Australasia. McHugh's work was an invaluable resource for my research and contextual understanding of the issues identified in this thesis.

Westphalian (or Western) sovereignty is one of the 'foundational doctrines of international law ... [one that was] formulated in such a manner as to exclude the non-European world', which, as it existed in the 18th century, explains how European sovereign states were able to acquire new territory by conquest, through treaties, or by settlement of land deemed terra nullius.²⁰ An appreciation of the more specific legal, political and personal concepts of sovereignty were important to my research and were informed by general academic consideration of these concepts.²¹

However, the absolutist notions of Westphalian sovereignty have been challenged in recent decades by increased globalisation, giving way, as explained by Sean Brennan, Brenda Gunn and George Williams, to a more realistic concept, where 'sovereignty is divisible and capable of being shared or pooled across different entities or locations'.²² This view is shared by James Tully.²³ Alexander Reilly takes this concept further by explaining how Australia's Constitution, with its existing power-sharing between the Commonwealth and the states, is capable of recognising a form of Indigenous governance.²⁴

¹⁹ P G McHugh, *Aboriginal Societies and the Common Law* (Oxford University Press, 2009).

²⁰ Julie Evans et al (eds), *Sovereignty: Frontiers of Possibility* (University of Hawaii Press, 2013).

²¹ Gabrielle Appleby, Alexander Reilly and Laura Grenfell, *Australian Public Law* (Oxford University Press, 2nd ed, 2014); see also Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 5th ed, 2010); see also James Tully, *Strange multiplicity: Constitutionalism in an age of diversity* (Cambridge University Press, 8th ed, 2007)

²² Sean Brennan, Brenda Gunn and George Williams, 'Sovereignty and its Relevance to Treaty-Making Between Indigenous Peoples and Australian Governments' (2004) 26(3) *Sydney Law Review* 307, 312.

²³ Tully, above n 21.

²⁴ Alexander Reilly, 'A Constitutional Framework for Indigenous Governance' (2006) 28(3) *Sydney Law Review* 403.

Harald Bauder's explanation that Australia's national imagination and identity are based on immigration, where there is no place for Aboriginal people, reflects current Federal and State Governments' Indigenous policies.²⁵ The recognition of Aboriginal people 'would wreak havoc on the national identity as an immigration country in which belonging is defined in political, not ethnic, terms'.²⁶ However, Julian Ku and John Yoo oppose this view in that 'a decline in Westphalian sovereignty does not prevent nation-states from maintaining other forms of sovereignty, or that nation-states will necessarily wither away.'²⁷ This view reinforces those of Brennan, et al, and Reilly. From a legal perspective, the possibility of recognising other sources of legal authority became reality in the 1992 High Court decision of *Mabo v Queensland (No 2)*.²⁸ *Mabo* rejected the legal fiction of *terra nullius* and recognised a new form of Aboriginal and Torres Strait Islander land rights under the Australian common law, based on Indigenous traditional law and customs. The real innovation of *Mabo* was that it was the first time traditional laws and customs were found to be not separate, but part of Australia's legal system. *Mabo* however, did not bestow sovereignty to Aboriginal and Torres Strait Islander peoples.

My concept of sovereignty adopts the broad notion of sovereignty as used by Aboriginal academics including Irene Watson. Watson writes that unlike abstract Western notions of sovereignty, concepts of Indigenous sovereignty are inclusive, not singular, and do not rely on 'some hierarchical god, represented by a monarch' as the head of state.²⁹ These notions have their origins in the Dreaming, which establishes how Aboriginal people connect with their land; the dynamics of social organisation in terms of ancestry, blood or kinship groups. Watson argues that 'the injustice of *terra nullius* was replaced by a *new* form – the power of extinguishment.'³⁰ Aboriginal academic Larissa Behrendt maintains that despite the changes to the *Constitution* resulting from the 1967 referendum, '[t]he cumulative effect of this legal framework is that we have a legal system that still leaves much faith [regarding Aboriginal rights] in the benevolence of

²⁵ Harald Bauder, 'Closing the immigration-Aboriginal parallax gap' (2011) 42 *Geoform* 517.

²⁶ Ibid 517.

²⁷ Julian Ku and John Yoo, 'Globalization and Sovereignty' (2013) 31(1) *Berkeley Journal of International Law* 213, 232.

²⁸ *Mabo v Queensland (No 2) (Mabo case)* (1992) 175 CLR 1.

²⁹ Irene Watson, 'Aboriginal Laws and the Sovereignty of *Terra Nullius*' (2002) 1(2) *borderlands e-journal* 32 [49].

³⁰ Ibid [25] (emphasis in original); see also *Native Title Act 1993* (Cth).

government.’³¹ Contemporary Indigenous views of sovereignty are many and varied and may include issues of land rights and self-determination as expressed by Brennan, et al, Behrendt, and Jill Webb, an Aboriginal lawyer and political activist.³²

Legal pluralism is defined by John Griffiths as the existence of more than one governing legal order in a particular jurisdiction or country.³³ For Griffiths, Aboriginal customary law is a clear example of legal pluralism, representing the fact of legal pluralism on the ground.³⁴ As described by Brian Tamanaha, legal pluralism is omnipresent in Australia, evidenced by the multiple layers of Federal, state and local government laws — even our social and religious endeavours are similarly governed or controlled by regulatory bodies of one form or another.³⁵ Legal pluralism, Reilly suggests, ‘offers a useful framework for the discussion of [Australian] Indigenous governance because it emphasises the system of laws and regulation that really governs the behaviour of groups, regardless of the formal legal position.’³⁶ Legal pluralism, so understood, is clearly evident in the APY Lands in the way that Anangu still retain traditional cultural practices associated with *Tjukurpa* (the Dreaming). Justice Martin Hinton, former South Australian Solicitor-General, observes that the current Constitutional debates on the recognition of Indigenous people ‘is about our identity as one people. Sections 25 and 51 [of the *Constitution*] and the absence of recognition reveal that we cannot as yet look ourselves in the mirror and say we are one.’³⁷

³¹ Evans et al, above n 20, 166.

³² See, eg, Brennan, Gunn and Williams, above n 22; see also Larissa Behrendt, ‘Indigenous Self-determination in the age of Globalization’ (2001) 3 *Balayi: Culture, Law and Colonialism* 1; see also Jill Webb, ‘Indigenous People and the Right to Self Determination’ (2012) (13) *Journal of Indigenous Policy* 75.

³³ John Griffiths, ‘What is Legal Pluralism?’ (1986) (24) *Journal of Legal Pluralism* 1.

³⁴ Ibid 4.

³⁵ Brian Z Tamanaha, ‘Understanding Legal Pluralism: Past to Present, Local to Global’ (2008) 30 *Sydney Law Review* 375.

³⁶ Reilly, above n 24, 411.

³⁷ Martin Hinton, ‘Is Australia’s Constitution Racist?’ (2015) 37(2) *The Bulletin: The Law Society of South Australia* 12, 19.

An understanding on how early colonial courts in New South Wales³⁸ and in Western Australia and South Australia³⁹ dealt with matters involving Aboriginal peoples reveals the tension with sovereignty on the ground. The many cases in which Australian courts continue to grapple with issues relating to Aboriginal offenders have also been revealing.⁴⁰ Both *Coe v Commonwealth*⁴¹ and *Walker v New South Wales*⁴² involved relatively recent challenges to the absolutist notions of Australian sovereignty. Although the cases of *R v Anunga*,⁴³ *Frank v Police*⁴⁴ and others involve the admissibility of police records of interviews as evidence in criminal matters, they provide not only an understanding of the relevance of Aboriginal customary law to resolving disputes but also suggest a loss of sovereignty across time rather than in one historical fell swoop. The more recent cases also suggest a change in perception of the reality and possibility of legal pluralism.

The literature discussed above informed my research on the tensions between traditional Aboriginal culture and the criminal law in the APY Lands. By doing so, these theoretical frameworks mean the thesis can present a new view on how these tensions manifest themselves in the APY Lands.

Chapter 3: The APY Lands in Context

The APY Lands is a unique region of South Australia. This vast area is held by Anangu under inalienable freehold title.⁴⁵ Non-Anangu require a permit to enter.⁴⁶ It is an area that is little known by ordinary people of Australia. During my police postings to the

³⁸ See, eg, *R. v. Ballard or Barrett* [1829] NSWSupC 26; sub nom. *R. v. Dirty Dick* (1828) NSW Sel Cas (Dowling) 2 (Forbes CJ, Dowling J) (13 June 1829); *R v Murrell and Bummaree* (1836) 1 Legge 72; [1836] NSWSupC 35 (Forbes CJ) (5 February 1836); *R v Bonjon* [1841] NSWSupC 92 (Willis J) (16 September 1841).

³⁹ *R v Gear* (1837, Western Australia Court of Quarter Sessions as reported by the Perth Gazette, 2 January 1837; *R v Helia* (1838) reported in the Perth Gazette 2 July 1838; *R v Wiwar* [1842] WA SupC 7 (3 January 1842); *R v Larry* [1847] SA SupC 39 (15 March 1847).

⁴⁰ See, eg, *Coe v Commonwealth (No 2)* (1993) 214 CLR 422; *Walker v New South Wales* (1994) 182 CLR 45; *R v Anunga* (1976) 11 ALR 412; *Frank v Police (SA)* [2007] SASC 288; *R v Robinson* [2010] NTSC 09; *Western Australia v Gibson* (2014) WASC 240; *R v Williams* (1976) 14 SASR 1; *R v Fernando* (1992) 76 A Crim R 58; *Bugmy v The Queen* [2013] HCA 37.

⁴¹ *Coe v Commonwealth (No 2)* (1993) 214 CLR 422.

⁴² *Walker v New South Wales* (1994) 182 CLR 45.

⁴³ *R v Anunga* (1976) 11 ALR 412.

⁴⁴ *Frank v Police (SA)* [2007] SASC 288.

⁴⁵ *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA).

⁴⁶ *Ibid* s 19.

Lands in the 1970s and 1980s I learned a great deal about Anangu culture and language from direct contact with the people themselves, particularly older men and women who were more than happy to share their knowledge. It was a privilege to have met many older people who were able to recall living a fully traditional lifestyle in the Lands before first seeing white people — many memorable hours were spent during police patrols sitting under a tree listening to their stories. These friendships resulted in my being personally invited to view and participate in several important *Tjukurpa inma* (traditional law ceremonies), experiences that were unforgettable. Personal friendships with Anangu of my own age were equally rewarding and I was fortunate to meet several on my return to the Lands for research field work in 2016. In particular, an old *malpa* (friend) from my policing years, Donald Fraser AOM,⁴⁷ now a *Tjilpi* (senior Anangu man) and a highly-respected community leader in the Ernabella (Pukatja) region, provided invaluable assistance for my 2016 interviews with Anangu participants.

During my police postings I also had the honour of befriending Bill Edwards, a pastor and linguist working on the Lands. Edwards later became an academic with the South Australian College of Advanced Education at Underdale which became the University of South Australia.⁴⁸ It was under his guidance while present on the Lands that I learned a great deal about the nuances of Anangu language and culture. In the late 1980s I completed an Associate Diploma of Arts (Aboriginal Studies), which included several Pitjantjatjara language units taught by him. I also made use of his interpreting skills in both police and court work during my posts to the Lands. Much of my contemporary understanding of Anangu cultural practices, of great value to my research, was sourced from Edwards' writing.⁴⁹

My research was further informed by Kathryn Trees regarding the difficulties of understanding traditional customary law and the Dreaming from a non-Aboriginal

⁴⁷ See 'Fraser's Story Landrights on NITV8000kps' <<https://www.youtube.com/watch?v=rzPegyfsHs>>.

⁴⁸ See Bible Society, *Farewelling Rev Bill Edwards: a life lived in service to Aboriginal people* (30 July 2015) <<http://www.archive.biblesociety.org.au/news/farewelling-rev-bill-edwards-a-life-lived-in-service-to-aboriginal-people>>; see also History Trust of South Australia, *Talking History - Bill Edwards, a remarkable man; a remarkable mission* <<http://history.sa.gov.au/events/billedwards/>>.

⁴⁹ See, eg, W H Edwards, *An Introduction to Aboriginal Societies* (Social Science Press, 2nd ed, 2004); Bill Edwards, 'Putuna Kulilpai: Interpreting for Pitjantjatjara people in courts' (1999) 14 *Journal of Judicial Administration* 99; Bill Edwards, 'A Personal Journey with Anangu History and Politics' (2011) 27 *The Flinders Journal of History and Politics* 13; Bill Edwards, 'Changes in Pitjantjatjara mourning and burial practices' (2013) 1 *Australian Aboriginal Studies Journal* 31; Edwards, above n 7.

perspective. Trees observed that because of the inadequacies of using English to describe the Aboriginal concept of law, terms such as ‘dreamtime’ and ‘law’ are often used simplistically.⁵⁰ Edwards and Coroner Wayne Chivell provide valuable insights into the importance in traditional Anangu society of avoidance relationships, particularly an individual’s identity. Anangu see their name as being part of their cultural identity, which plays a vital role in their interactions with their kin and within their communities.⁵¹ Trees and anthropologist and linguist Peter Sutton both provide relevant information about traditional sanctions, where, unlike the European law’s emphasis on individual offenders and victims, the emphasis in traditional Aboriginal law is more about the relationships between kin networks in order to restore social equilibrium.⁵²

Sutton writes about the concept of cultural relativism, the belief that a person’s philosophies, traditions, morals and customs should be viewed in the context of their culture. In what was to be later seen as a controversial journal article, Sutton argues that while narrow political, economic and social pressures have enlivened ‘strong relativism’ as an ideology in the collective conscience, it is undeniable that these forces have yielded some highly problematic contradictions. The application of ‘law’ to matters of cultural relativism within the Australian landscape has been affected by societal change, including a broader demographic, which has frayed the ‘strong relativism’ that informed liberal progressive opinion some thirty years ago.⁵³ While broadly agreeing with Sutton, Diane Austin-Broos observes that ‘relativism’ has weakened and has become less appropriate than it once was in both legal practice and in geographical terms. She comments that an ideology sympathetic to relativism may be sustained within facets of Australian society in order to meet particular ends and writes

⁵⁰ Kathryn Trees, ‘Contemporary issues facing customary law and the general legal system: Roebourne - a case study’ (Background paper No 6, Law Reform Commission of Western Australia, January 2006) 281 <www.lrc.justice.wa.gov.au/_files/P94_Background_Papers.pdf>; note that ‘dreaming’ is more commonly used in place of ‘dreamtime’.

⁵¹ W H Edwards, *An Introduction to Aboriginal Societies* (Social Science Press, 2nd ed, 2004); see also Wayne Chivell, ‘Inquest into the deaths of Kunmanara Ward, Kunmanara Ken, Kunmanara Ryan and Kunmanara Cooper - Finding of the State Coroner’ (2005).

⁵² Peter Sutton, ‘Aboriginal customary law: what is it and what is it not?’ (Paper presented at the SA Law Society Seminar: Aboriginal Customary Law, Adelaide, 29 July 2006) 2; see also Trees, above n 50, 222.

⁵³ Peter Sutton, ‘Customs not in common: cultural relativism and customary law recognition in Australia’ (2006) 6 (March) *Macquarie Law Journal* 161, 174; see also Diane Austin-Broos et al, ‘Responses to Peter Sutton’ (2006) 6 (March) *Macquarie Law Journal* 177, 177.

that ‘indigenous enclave politics and non-indigenous self-redemptive feel-goodism’ can be seen as being two ends of the spectrum.⁵⁴ Archana Parashar states that despite the state’s legal assumption ‘that it remains the only source of valid use of force and it, in its magnanimity, has decided to allow some customary rules to operate. But by the very nature of this grant of largesse, it is susceptible to be withdrawn anytime.’⁵⁵ Such a condition, Parashar argues, is cultural imperialism, not cultural relativism.⁵⁶ My research was assisted by these debates, providing an academic perspective into the problems faced by Anangu in their struggle towards self-determination in the 21st century.

The writings of Summers and Edwards, and early Aboriginal protectionist legislation, were an invaluable resource regarding the post-European settlement history of the APY Lands. They revealed the effects of government policies of protectionism in the early decades of the 20th century, to later policies of assimilation, self-determination, and now reconciliation in the 21st century.⁵⁷ The protracted struggle for Anangu land rights leading to the enactment of the APY Land Rights Act⁵⁸ is well documented by Phillip Toyne and Daniel Vachon.⁵⁹ This literature provided me with a deeper understanding of how the contemporary administration of justice issues identified in this thesis came to be.

Formal and social demographic information was obtained from a variety of sources including my own research conducted on the Lands in 2016.⁶⁰ Such information not

⁵⁴ Austin-Broos et al, above n 53, 177.

⁵⁵ Ibid 182.

⁵⁶ Ibid.

⁵⁷ See, eg, Summers, above n 6; Edwards, above n 49; see also *Aborigines Act 1911* (SA).

⁵⁸ *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA).

⁵⁹ Phillip Toyne and Daniel Vachon, *Growing Up the Country: The Pitjantjatjara struggle for their land* (McPhee Gribble / Penguin, 1984); see also *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA).

⁶⁰ See, eg, Australian Bureau of Statistics, *1370.0 - Measures of Australia's Progress, 2010: Health* (15 September 2010)

<<http://www.abs.gov.au/ausstats/abs@.nsf/bb8db737e2af84b8ca2571780015701e/f1452ed1b3b2c77aca25779e001c4758!OpenDocument#>>; Australian Institute of Health and Welfare, ‘Suicide and hospitalised self-harm in Australia: trends and analysis’ (Flinders University, 2014); The Anangu Lands Paper Tracker, *Suicide and self-harm on the APY Lands: police data* (September 2013) The Anangu Lands Paper Tracker <<http://www.papertracker.com.au/2013/09/suicide-and-self-harm-on-the-apy-lands-police-data/>>; Cathy Jackman, ‘Hearing Impairment: Access and Opportunity’ (2012) 22(1) (March) *Special Education Resource Unit : SERUpdate* 9; Linnett Sanchez, ‘Submission No 31 to Commonwealth of Australia, Senate Community Affairs Reference Committee, *Inquiry into hearing health in Australia*’ (Flinders University, 8 October 2009); Damien Howard et al, ‘Aboriginal Hearing Loss and the Criminal

only informed my overall research but provided valuable background on the poor health and welfare conditions experienced by Anangu in the Lands, issues that are argued in this thesis as causal factors regarding their often-adverse interaction with the criminal justice system.

The ground-breaking Royal Commission into Aboriginal Deaths in Custody in 1991 and other formal enquiries into Aboriginal social and legal justice issues were invaluable and important to my research.⁶¹ These reports provided an understanding of the underlying social, cultural and legal issues of Aboriginal and Torres Strait Islander peoples' struggles with the criminal justice system across time. Despite the findings of these reports, injustices still exist, demonstrating a failure of the current administration of justice in the APY Lands and indicating the need for the research outlined in this thesis.

Chapter 4: Policing the APY Lands

While I have personal experience upon which to draw regarding policing practices in the APY Lands between 1978 and 1988, additional historical information was gleaned from various sources including the literature of Chas Hopkins and John White, both former high-ranking police officers.⁶² Further information regarding policing practices in the APY Lands was obtained from official SAPOL documents in my possession,⁶³ revealing a sustained lack of effective cultural awareness training for officers stationed in the Lands across time and continuing today.⁶⁴ Additional insight into policing practices, including the SAPOL APY Lands Community Constable scheme, was obtained online from the Anangu Lands Paper Tracker and from reports to the

Justice System' (1993) 3(65) (December) *Aboriginal Law Bulletin* 9; K S Kylie Lee et al, 'Cannabis use in remote Indigenous communities in Australia: endemic yet neglected' (2009) 190(5) *Medical Journal of Australia* 228; E P Mullighan, 'Children on Pitjantjatjara Yankunytjatjara (APY) Lands Commission of Enquiry: A Report into Sexual Abuse' (2008).

⁶¹ Commonwealth, 'Royal Commission into Aboriginal Deaths in Custody National Report' (1991); Chivell, above n 51; Mullighan, above n 60.

⁶² Chas Hopkins, *South Australia Police 1838 - 2003: A history of the development and operations of the force from its establishment* (Digital Productions, 2005); John White, 'Indulkinna Police Camp: Near Granite Downs Station, Far North' (2016) November/December 2016 *SA Police Historical Society 'Hue and Cry' (Official Newsletter)*.

⁶³ F A Richardson, 'Police/Aboriginal Relations in South Australia' (South Australian Police Department, 1985); SAPOL, 'Community Constable & Police Aboriginal Liaison Officer Scheme: APY & Yalata Lands: Evaluation and Options' (South Australia Police, June 2011).

⁶⁴ Attorney-General (SA), 'Police Ombudsman Annual Report 2015' (2015).

Department of the Premier and Cabinet Aboriginal Affairs and Reconciliation Division.⁶⁵

Despite the success of community night patrols in New South Wales and other jurisdictions as reported by Amanda Porter,⁶⁶ the operation and failure of the 2004 SAPOL organised volunteer Community Safety Patrols (night patrols) on the Lands raises a question of whether APY community members should accept greater responsibility for the conduct and operation of their own programs.⁶⁷ The thesis identifies problems with programs such as the Community Constable scheme and night patrols in semi-traditional communities due to cultural obligations, avoidance relationships and the location of traditional authority in Anangu culture as outlined by Edwards.⁶⁸ It concludes that while such matters lie at the heart of traditional Anangu culture, they are not insurmountable.

Recruitment of suitable SAPOL officers to the APY Lands has been a recurring problem for decades and is likely to continue despite the current fly-in, fly-out (FIFO) policing practice and the generous employment incentives offered.⁶⁹ These issues are key areas of my research and formed the basis for many of the questions asked during my interviews of Anangu in 2016, exposing a general dissatisfaction with contemporary policing practices on the Lands. As revealed by my research, it appears one of the driving forces behind this dissatisfaction is the total lack of cross-cultural awareness

⁶⁵ See, eg, The Anangu Lands Paper Tracker, *Anangu Lands: recruiting Community Constables* The Anangu Lands Paper Tracker <http://www.papertracker.com.au/archived/anangu-lands-recruiting-community-constables/#_edn57>; The Anangu Lands Paper Tracker, *Update on APY Community Constables* <<http://www.papertracker.com.au/2016/02/update-on-apy-community-constables/>>; see also Nerida Saunders, 'South Australian Government Update: Progress on the Anangu Pitjantjatjara Yankunytjatjara (APY) Lands - Service Delivery and Development' (Department of the Premier and Cabinet Aboriginal Affairs and Reconciliation Division, December 2013).

⁶⁶ Amanda Porter, *Decolonising Juvenile Justice: Aboriginal Patrols, Safety and the Policing of Indigenous Communities* (PhD Thesis, University of Sydney, 2014).

⁶⁷ Anangu Lands Paper Tracker, *Update on APY Community Constables*, 4 February 2016 <<http://www.papertracker.com.au/2016/02/update-on-apy-community-constables/>>; see also Mullighan, above n 60.

⁶⁸ Edwards, above n 49.

⁶⁹ See Mark Carroll, 'Policing the APY Lands' (2007) (April) *South Australian Police Journal* 8; Jenny Fleming and Rick Sarre, 'Policing the NPY Lands - The Cross-Border Justice Project' (Winter 2011) 3(1) *Australasian Policing* 21; Industrial Relations Commission, 'South Australia Police Enterprise Agreement 2011: File No. 6285 of 2013, Cross Reference File No. 1983/2011. Variation Orders made Pursuant to Section 84 on 14/1/2014' (14 January 2014) <<http://www.industrialcourt.sa.gov.au/index.cfm?objectid=F61027BD-C936-81D5-BD12239283ED4465>>.

training provided to APY SAPOL officers by tertiary qualified teachers with input from Anangu themselves.⁷⁰ Edwards makes it clear that an understanding of Anangu culture and language is essential when working in the Lands.⁷¹ The complexities of APY languages, spoken as a first language by the majority of Anangu, and the difficulties of translation into English, are explained by Edwards and echoed by barrister David Ross: ‘Language, culture and land are all entwined. It is difficult to know one in the absence of the others.’⁷² The resolution of these difficulties when police interact officially with Anangu is imperative for the delivery of a fair and just policing service on the Lands.

Gratuitous concurrence, explained by Lorana Bartels as a condition where Aboriginal people ‘freely say “yes” in response to a yes/no question, regardless of their understanding of the question or their belief in the truth or falsity of the proposition’,⁷³ is a phenomenon common in interactions between SAPOL officers and alleged offenders in the Lands. It is also explained by Edwards and Michael Cooke and revealed by my research.⁷⁴ *Kunta* (shame), described by Edwards as a concept ‘which has no similar equivalent in non-Aboriginal society but is a mixture of embarrassment and fear’,⁷⁵ plays an important role in Anangu culture. It has a negative effect on alleged offenders being interviewed by police and revealed by research. Several important legal cases also informed my research regarding the serious problems associated with the misunderstanding of language and culture,⁷⁶ further exposing a continuing lack of effective cross-cultural awareness by police.

Language barriers are, as described by Cooke, often ignored by police when interviewing alleged Aboriginal offenders — people who use their own language and

⁷⁰ Richardson, above n 63; SAPOL, above n 63; Mullighan, above n 60; Attorney-General (SA), above n 64.

⁷¹ See Edwards, above n 49.

⁷² David Ross, ‘Criminal law practice: Defending Aboriginal people’ (2007) 31(2007) *Criminal Law Journal* 332, 333.

⁷³ Lorana Bartels, ‘Police interviews with vulnerable adult suspects: report No. 21’ (Australian Institute of Criminology, July 2011) <<http://www.aic.gov.au/publications/current%20series/rip/21-40/rip21.html>>; see also *R v Anunga* (1976) 11 ALR 412.

⁷⁴ Edwards, above n 49; Michael Cooke, ‘Anglo/Aboriginal communication in the criminal justice process: A collective responsibility’ (2009) 19 *Journal of Judicial Administration* 26.

⁷⁵ Bill Edwards, ‘Putuna Kulilpai: Interpreting for Pitjantjatjara people in courts’ (1999) 14 *Journal of Judicial Administration* 99, 108.

⁷⁶ See, eg, *R v Anunga* (1976) 11 ALR 412; *R v Jimmy Marmowa* (1996) NTSC 199/95 (20 November 1996); *Frank v Police (SA)* [2007] SASC 288; *R v Robinson* [2010] NTSC 09; *Western Australia v Gibson* (2014) WASC 240.

speak English as a second language often use a form known as Aboriginal English, which is influenced by the limitations of their first language. While they may appear to be reasonably fluent in English the opposite is more likely.⁷⁷ These problems were not only commonly encountered during my own policing of the Lands but were also evident during my interviews of Anangu in 2016. There is also a scarcity of interpreters in the Lands, highlighted by the Royal Commission into Aboriginal Deaths in Custody, Coroner Chivell's inquest findings and the Mullighan Report.⁷⁸

An article by Arie Freiberg and Neil Morgan, and SAPOL general orders provided information on the bail conditions applied to Anangu, and Aboriginal people generally that underpin my analysis of Bail conditions in the APY Lands.⁷⁹ This literature emphasised that bail should not be seen as a penalty. Freiberg and Morgan outline the important principle that 'a person on pre-trial bail has not been convicted of an offence and is to be treated as innocent until proven guilty.'⁸⁰

Chapter 5: The Administration of Justice in the APY Lands

Much of my research into the historical operation of courts in the APY land was informed not only by my own experiences as a police officer and prosecutor in the 1970s and 1980s, but also by the writings of Judge J W Lewis, Judith Worrall, former magistrate Garry Hiskey and lawyer Richard Bradshaw.⁸¹ According to Lewis, the first magistrates courts began to sit at Ernabella in about 1968 and were then conducted every four months at Kalka, Amata, Ernabella and Indulkana from the early to mid-1970s. Prior to 1968, alleged Anangu offenders were conveyed to Oodnadatta to be dealt with, or for more serious offences, taken to the Port Augusta Supreme Court Circuit.⁸²

⁷⁷ Michael Cooke, *Caught in the middle: Indigenous interpreters and customary law*, Background paper no. 2. Perth: Law Reform Commission of Western Australia (2006).

⁷⁸ Commonwealth, above n 61; Chivell, above n 51; Mullighan, above n 60.

⁷⁹ *Bail Act 1935* (SA); *Summary Offences Act 1953* (SA); Arie Freiberg and Neil Morgan, 'Between bail and sentence: the conflation of dispositional options' (2004) 15(3) *Current Issues in Criminal Justice* 220; SAPOL, *General Order: Arrest and Custody Management* (2014) 55.

⁸⁰ Freiberg and Morgan, above n 79, 222.

⁸¹ Aboriginal Customary Law Committee, 'Preliminary Report of the Aboriginal Customary Law Committee' (Adelaide, September 1979) <<http://www3.austlii.edu.au/au/other/IndigLRes/1979/7.pdf>> 40–42; Worrall, above n 11; Hiskey, above n 11; Richard Bradshaw, 'Community representation in criminal proceedings' (1986) 11(12) *Legal Services Bulletin* 111.

⁸² *Ibid.*

Descriptions of the conduct of early APY Courts were informed by my own experiences and those of Garth Nettheim,⁸³ Hiskey and Bradshaw. More contemporary research into the administration of justice on the Lands was also obtained from the Mullighan Report,⁸⁴ which is critical of the lack of infrastructure available not only to magistrates and their staff, but also to prosecutors and defence lawyers, giving rise to the court's use of community buildings and the rushed nature of APY Courts, matters which I personally observed in 2015 and 2016.⁸⁵ The historical and contemporary workload of the APY Courts was sourced from writings of Worrall and Hiskey, statistics provided by the OCSAR, and data extracted from APY Court lists in my possession from personal visits to the Lands in 2015 and 2016. Information regarding hearing delays due to the rushed nature of the APY Courts, and those caused by not-guilty trials being adjourned to Coober Pedy, were obtained from my interviews with Anangu, magistrates and lawyers and from court lists for the APY Courts from 2015 and 2016 mentioned previously. These delays, and adjournments of trials to Coober Pedy, have a potential for injustice to be experienced by Anangu with strong incentives to enter pleas of guilty for convenience as explained by lawyer Benjamin Bickford.⁸⁶

Research about the problems associated with Anangu culture and language as it affects the operation of the courts were informed by the same sources as those for chapter 4 discussed above. Specifically, historical and contemporary issues with language translation, and the lack of properly trained interpreters for the court, prosecutors and lawyers, were informed by my own observations and interviews, and the literature of Bradshaw, Nettheim, Edwards, Cooke, and from case law.⁸⁷ Paul Bennett's text on Nunga and Aboriginal Sentencing Courts informed my research on that topic, revealing that while such courts have been successful in southern regions of South Australia, and across interstate jurisdictions, they are not utilised in the APY Lands.⁸⁸

⁸³ Garth Nettheim, 'Summary Jurisdiction on the Pitjantjatjara Lands' (1990) 2(45) *Aboriginal Law Bulletin* 4; Hiskey, above n 11.

⁸⁴ Mullighan, above n 60.

⁸⁵ See also Anna Bulman and Emily Sims, 'The fight for justice in remote indigenous communities' (2013) 34(7) (August) *The Bulletin: The Law Society of South Australia*.

⁸⁶ Benjamin Bickford, *Convenience Pleas* (Aboriginal Legal Service, NSW and ACT, 2011).

⁸⁷ Bradshaw, above n 81; Nettheim, above n 83; Edwards, above n 49; Cooke, above n 77; *Frank v Police (SA)* [2007] SASC 288.

⁸⁸ Paul Bennett, *Specialist Courts for Sentencing Aboriginal Offenders: Aboriginal Courts in Australia* (The Federation Press, 1st ed, 2016); see also *Criminal Law (Sentencing) Act 1988* (SA).

My research into penalty options available to the APY Lands Court and the inappropriate imprisonment of Anangu prisoners in mainstream prisons was informed from a variety of sources including the Royal Commission into Aboriginal Deaths in Custody, Coroner Chivell's inquest into petrol sniffer deaths, the Mullighan Report and from Department for Correctional Services annual reports.⁸⁹

As with issues experienced by the APY Courts, those associated with the provision of legal representation on the Lands, as dealt with in part 2 of chapter 5, were informed from a variety of sources. These included interviews with Anangu, lawyers with current or past APY Court experience, Aboriginal Legal Rights Movement (ALRM) and Legal Services Commission of SA (Legal Aid) annual reports, and the literature of Cheryl Axleby, the chief executive officer of ALRM.⁹⁰ This research reveals that a lack of funding for both ALRM and Legal Aid is one of the key elements of my findings of the generally poor legal services available to Anangu who find themselves in conflict with the criminal justice system. Other elements also include time and staffing constraints, a lack of continuity by attending lawyers and findings of minimal meaningful cultural awareness by those providing contemporary legal services.⁹¹

Chapter 6: Recommendations

Except for comparisons used from other common law jurisdictions, no new materials or literature were reviewed. Where comparisons are used, I found that literature produced by Savvas Lithopolous provided informative insights regarding policing practices

⁸⁹ Commonwealth, above n 61; Chivell, above n 51; Mullighan, above n 60; see also Department for Correctional Services, 'Annual Report 2014-15' (October 2015); see also Peter Whellum, 'Missed Opportunities for Culturally Appropriate Imprisonment of APY Offenders: The Cross Border Justice Act 2009 (SA)' (2017) 8(28) *Indigenous Law Bulletin* 20.

⁹⁰ See, eg, ALRM, 'Aboriginal Legal Rights Movement: Annual Report 2015-2016' (Aboriginal Legal Rights Movement, 2016); Legal Services Commission of South Australia, '36th Annual Report 2013-14' (September 2014) <http://www.lsc.sa.gov.au/cb_pages/annual_report_current.php>; Cheryl Axleby, 'Access to Justice for our most Vulnerable Citizens is a Right not a Privilege' (2017) 39(4) *The Bulletin: The Law Society of South Australia* 22.

⁹¹ Research into these aspects was informed by Law Society of South Australia, 'Lawyer's Protocols for Dealing with Aboriginal Clients in South Australia' (2010); Phillip Rodgers-Falk, 'Growing the number of Aboriginal and Torres Strait Islander Law Graduates: Barriers to the Profession' (2011) <<https://docs.education.gov.au/documents/growing-number-aboriginal-and-torres-strait-islander-law-graduates-barriers-profession>>; Michael Esposito, 'Lack of Cultural Support to Aboriginal Communities an 'Appalling Situation'' (2015) 37 (October) *The Bulletin: The Law Society of South Australia* 12; Kimberley Interpreting Service, 'Guidelines to determine whether an Indigenous language interpreter is required' <<http://www.kimberleyinterpreting.org.au>>; see also Northern Territory Aboriginal Interpreter Service, 'How to decide if you should work with an interpreter — Legal' <<http://www.nt.gov.au/ais>>.

within First Nations Reserves in the USA and Canada.⁹² Additional literature on this subject was also provided by Rick Ruddell and Savvas Lithopolous.⁹³

Karen Whonnock provided useful material apropos the operation of the Aboriginal Courts of the USA's First Nations Colville Reserve in Washington State, where culturally relevant restorative justice regimes have operated successfully for several decades.⁹⁴ Whonnock also provided similar information about the success of restorative justice regimes in operation for Canadian First Nations People.⁹⁵ My research on current New Zealand policing practices was informed by the 2014 and 2016 New Zealand Police Annual Reports.⁹⁶ Comparative research regarding the operation of the New Zealand Rangatahi Courts, Māori youth courts utilising restorative justice programs, was provided by the work of Matiu Dickson and Kathryn Fox.⁹⁷

III THESIS OUTLINE

Chapter 2 provides an overview of sovereignty and legal pluralism from Western and Indigenous perspectives, lenses through which the issues associated with the administration of justice in the APY Lands have been identified and analysed. The chapter highlights the dichotomy that exists in questions of Aboriginal sovereignty and legal pluralism. Although both appear to have been legally settled, sovereignty on the ground remains contested. Similarly, with respect to legal pluralism in the criminal law arena, while full jurisdiction by the courts over matters involving Aboriginal *inter se* matters has been established, there still exists a soft form of legal pluralism, evident in legislation, the common law and the continued observance of traditional law.

⁹² Savvas Lithopoulos, 'International Comparison of Indigenous Policing Models' (2007) <<https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/cmprsn-ndgns-plcng/cmprsn-ndgns-plcng-eng.pdf>>.

⁹³ Rick Ruddell and Savvas Lithopoulos, 'Officer Perceptions of Canada's 'First Nations Policing Program'' (2011) 84 *Police Journal (Canada)*.

⁹⁴ Karen L Whonnock, 'A tale of two courts: the New Westminster First Nations Court and the Colville Tribal Court' (2011) 44(1) *University of British Columbia Law Review* 99.

⁹⁵ Ibid.

⁹⁶ New Zealand Police, 'Annual Report 2014' (2014) <<http://www.police.govt.nz/about-us/publication/annual-report-2014>>; New Zealand Police, 'Annual Report 2016' (2016) <<http://www.police.govt.nz/about-us/publication/annual-report-2016>>.

⁹⁷ Matiu Dickson, 'The Rangatahi Court' (2011) 19(2) *Waikato Law Review*: 86; Kathryn J Fox, 'Trying to Restore Justice: Bureaucracies, Risk Management, and Disciplinary Boundaries in New Zealand Criminal Justice' (2015) 59(5) *International Journal of Offender Therapy and Comparative Criminology* 519.

Chapter 3 provides an historical and contemporary description of the APY Lands from pre-colonisation across time, offering context for the present problems faced by Anangu. The chapter highlights a significant disparity in the treatment of non-Indigenous Australians as against the Indigenous population and Anangu in particular. Historical factors give voice to the deep sense of injustice felt by the ‘First Australians’ who, from earliest colonial times, were compelled to submit to a foreign criminal justice system. Traditional laws and justice mechanisms were cast aside, leading Anangu, and Aboriginal and Torres Strait Islander peoples in general, to experience a discord between the contemporary Australian legal system, which asserts itself as the sole resource of value, force and rule of law, and their own legal traditions. With their collective will, rights and laws overborne for a period of nearly 200 years from South Australia’s settlement until the present, Anangu and other Aboriginal and Torres Strait Islander peoples remain repressed and questions of self-determination remain unsettled.

While Anangu retain a semi-traditional lifestyle, one that is in the main still governed by the ancient laws of *Tjukurpa* (Anangu Dreaming), it is nevertheless under attack through chronic unemployment, the use of illicit drugs, alcohol and gambling.⁹⁸ These issues, and those associated with poor health standards and living conditions, underscore the urgent need for reform in the APY Lands. Discriminatory legislation and current policing practices in APY Lands communities has a stifling effect on traditional culture. These factors contribute to the current overrepresentation of Aboriginal people in the prison system and are obstacles that will be further explored in this thesis.

Chapter 4 offers a brief historical overview of policing the north-west of South Australia, providing context to the present policing practices and associated issues. It examines whether any intrinsic difference exists between different policing strategies across time, from the use of Aboriginal Police Wardens and Police Aides, to the present Community Constable and Police Aboriginal Liaison Officers programs. Importantly, the chapter discusses the many issues associated with current policing practices as identified from interviews conducted with Anangu in 2016. Although police practices are constrained by adherence to State law and SAPOL policy, the chapter reveals that

⁹⁸ Mullighan, above n 60.

very little cross-cultural training, if any, is provided by SAPOL to those officers posted to the Lands. Of concern is the failure of SAPOL to use professionally trained interpreters in their interactions with Anangu, and their failure to recognise and acknowledge when an interpreter should be used.

The chapter considers the merits of current incentive schemes to attract SAPOL officers to work in the Lands and concludes that current policing strategies have been unsuccessful. This lack of success casts doubts on the general approach to policing which fails to recognise the intrinsic sovereignty needs of APY communities. The chapter argues that a paradigmatic shift in the overall approach to policing is required.

Chapter 5 explores issues associated with the administration of justice on the Lands. Part 1 examines those associated with the operation of APY Court, followed by an examination of issues of court operations/procedures, court interpreters, community representation regarding sentencing options, and Aboriginal Sentencing (Nunga) Courts. The chapter also investigates issues of cross-cultural awareness by the court and its staff, and Anangu, and issues associated with the imprisonment of Anangu offenders far from their families and communities in mainstream prisons.

Part 2 of chapter 5 provides a brief overview of the provision of legal representation for Anangu appearing before APY Courts from the 1970s to the late 1990s before dealing with contemporary services. It critically examines issues related to client confidentiality and conflicts of interest, time and staffing limitations, and the lack of continuity due to the frequent changes in attending lawyers. The effects of cultural difference are also discussed from the perspective of cross-cultural awareness training, the use of interpreters, hearing problems suffered by Anangu, convenience pleas, and community representation in the court sentencing process.

Chapters 4 and 5 together reveal major factors affecting policing practices and the administration of justice within the APY Lands, exposing not only an inadequate understanding and appreciation of the specific cultural needs of APY Anangu but, more fundamentally, is symptomatic of a dysfunctional system of justice imposed in the Lands. The current system is impersonal, results-driven and lacking cultural sensitivity. These problems have been ongoing for decades and injustices will continue to occur in

the APY Lands unless there is a dramatic rethinking. Aboriginal people in the Lands have a right to be treated fairly, justly and with cultural sensitivity by those involved in the administration of justice.⁹⁹

Chapter 6 examines recommendations on how such a rethinking might be achieved and taps into the problems of Aboriginal people's relationship to the criminal law which is an ongoing inheritance of a colonial system. The chapter concludes with a reflection on the way other common law jurisdictions, the USA, Canada and New Zealand, have dealt with First Nations Peoples and makes recommendations based on these reflections.

Chapter 7 concludes the thesis by returning to the intentions of Parliament when the original APY Land Rights Act¹⁰⁰ was enacted. It contends that greater Anangu autonomy was intended by Parliament and that it was provided in the spirit of increasing Indigenous sovereignty and cultural pluralism on the APY Lands.¹⁰¹ My research reveals that although official Government policies relating to the criminal justice system provide recognition of Anangu self-determination, there has been a failure to implement practices on the APY Lands consistent with these policies.

The Appendices contain photographs taken during my police postings to the APY Lands and during my 2016 APY Lands research visits — see Appendix 1. A copy of the University of Adelaide Human Research Ethical Committee's approval for the conduct of my research is included in Appendix 2. Appendices 3A and B include a copy of the permits obtained from the APY Executive for the research and to travel within the APY Lands in 2016. Permission to use the copyrighted maps of the APY and NPY Lands, used in chapter 1, are contained in Appendices 4A and B. Other

⁹⁹ See, eg, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, ratified Australia 13 November 1980, 999 UNTS 171 (entered into force 23 March 1976); see also *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3; see also UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*: resolution / adopted by the General Assembly, 2 October 2007, formally endorsed by Australia in 2009.

¹⁰⁰ *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA).

¹⁰¹ See South Australia, *Parliamentary Debates* (second reading speech *Pitjantjatjara Land Rights Bill*), House of Assembly, 23 October 1980, 1387 (David Tonkin); see also *Gerhardy v Brown* (1985) 159 CLR 70; see also Deirdre Tedmanson, *Shifting State Constructions of Anangu Pitjantjatjara Yankunytjatjara: Changes to the South Australian Pitjantjatjara Land Rights Act 1981-2001* (PhD Thesis, Australian National University, 2016) 242–45.

information includes a copy of the ALRM Arrest Information Sheet (Appendix 5), current as of 2017. Details of the police cautions (right to silence) as administered by the Northern Territory Police are contained in Appendices 6A and 6B. To facilitate further research, Appendix 7 contains the graphed results of interviews with Anangu participants during my research in 2016.

CHAPTER 2: SOVEREIGNTY, LEGAL PLURALISM AND CRIMINAL JUSTICE

I INTRODUCTION

This chapter provides a theoretical and historical context for the administration of justice in the Anangu Pitjantjatjara Yankunytjatjara (APY) Lands. The chapter explores the concepts of sovereignty and legal pluralism which form the lenses through which the thesis examines criminal justice in the APY lands. These concepts are inter-related. Legal pluralism is a reality for Aboriginal people. Indeed, the existence of legal pluralism indicates a pre-existing sovereignty. Within the complexity of co-existing legal systems, self-determination provides a means to navigate the demands and opportunities of each legal system.

Part II examines concepts of sovereignty from western and Indigenous perspectives. It discusses legal challenges to Australia's sovereignty in the High Court decisions of *Coe v Commonwealth* and *Walker v New South Wales*.¹ The section also reveals challenges to absolutist sovereignty brought about by globalisation and a new world order in which a more realistic concept of shared sovereignty offers the possibility for Indigenous governance within an existing sovereign state. Part II concludes with a discussion of how traditional culture and law (the Dreaming) form the basis for Indigenous concepts of sovereignty.

Part III introduces and examines the concepts of legal pluralism and how, by focusing on the creation of shared jurisdictional spaces, self-determination for different groups can be facilitated within a single sovereignty. This has particular resonance with the subject of this thesis.

The purpose of Part IV is to show that early *inter se* cases reveal judicial struggles regarding questions of jurisdiction and amenability of Aboriginal people to the English criminal law in the colonies of New South Wales, Western Australia and South Australia.² Although these early cases show that a lack of jurisdiction was not seen as a

¹ *Coe v Commonwealth (No 2)* (1993) 68 ALJR 110; *Walker v New South Wales* (1994) 182 CLR 45.

² See *v Ballard or Barrett* [1829] NSW SupC 26; sub nom. *R v Dirty Dick* (1828) NSW Sel Cas (Dowling) 2 (Forbes CJ, Dowling J) (13 June 1829); see also *R v Murrell and Bummaree* (1836) 1 Legge

challenge to Crown sovereignty over all of Australia, they reveal that jurisdiction only extended to Aboriginal peoples who had contact with colonial society. There was early recognition that the extension of jurisdiction was a gradual process, where jurisdiction had to catch up with the assertion of Crown sovereignty. This thesis contends that many of the questions raised in early colonial cases are mirrored in today's debates about Indigenous self-determination. Even where criminal jurisdiction was established, early courts were reluctant to apply the full force of the law, demonstrating a form of soft legal pluralism, which continues today. This thesis also contends that the administration of justice in Aboriginal communities will only be effective if due regard is paid to the reality of co-existing legal systems.

II SOVEREIGNTY

Sovereignty is generally understood to be a notion where absolute power resides with the state and consists of two concepts, legal sovereignty and political sovereignty. Legal sovereignty is a state's authority to make laws, while political sovereignty involves the state's capacity to generate and exercise political power.³ Legal sovereignty is about parliament's law-making supremacy — 'internal sovereignty' — and the characteristics of statehood in international law — 'external sovereignty'. On the other hand, political sovereignty is claimed to be 'the basis for political control within a state as a matter of fact, whether or not this control is recognised in law.'⁴ Political sovereignty, in this thesis, however, is a notion that needs to be broadened to include not only issues of control but also of authority. Within Australian states, police exercise sovereign authority and control through the potential use of statutory force. However, this does not necessarily mean police have the respect of people over whom the statutory authority is exercised. For example, chapter 4 of this thesis discusses the dissatisfaction with present policing practices experienced by Aboriginal people (Anangu) of the APY Lands. Chapter 4 exposes that authority might be distinguished

72; [1836] NSW SupC 35 (Forbes CJ) (5 February 1836); see also *R v Wiwar* [1842] WA SupC 7 (3 January 1842); see also *R v Larry* [1847] SA SupC 39 (15 March 1847).

³ See, eg, Gabrielle Appleby, Alexander Reilly and Laura Grenfell, *Australian Public Law* (Oxford University Press, 2nd ed, 2014) 1, 7.

⁴ Alexander Reilly, 'A Constitutional Framework for Indigenous Governance' (2006) 28(3) *Sydney Law Review* 403, 408.

from sovereign control to highlight the importance of cultural acceptance for State policing to be effective in that particular region.

As this thesis deals with the conflict between traditional Aboriginal culture and the criminal law, an examination of sovereignty from both Western and Indigenous perspectives is necessary to demonstrate the possibility in Western law of sharing sovereign control. This thesis will argue that regardless of the formal assertion of sovereignty, for criminal justice to be effective in the APY Lands there needs to be recognition of the reality of substantial cultural difference. This requires attention to alternative governance frameworks within APY communities. These frameworks, deriving from an alternative sovereignty, contain important alternative mechanisms for addressing legal questions. This thesis will argue that there needs to be more than the simple assertion of formal sovereignty in law for it to be effective in the APY Lands.

A *Western Concepts of Sovereignty*

A recognised starting point for an understanding of Western concepts of sovereignty is that of the 17th century Treaty of Westphalia in 1648. This treaty saw the end of the European Thirty Years' War and held 'that all sovereigns are equal and, further, that intervention in the affairs of a sovereign state, most particularly in the exercise of its powers over its own territory, is prohibited.'⁵ This historical background has given rise to the use of 'Westphalian sovereignty' as a term often used interchangeably with 'Western sovereignty'; both terms will be used in this thesis. Sean Brennan, et al, however, refer to the French lawyer, philosopher and writer Jean Bodin as being 'widely seen as the "father" of sovereignty' in the 16th century, with his 'concept of a single omnipotent king at the top of a pyramid of power.'⁶

Regardless of its origins, Antony Anghie states that Westphalian sovereignty is one of the 'foundational doctrines of international law ... formulated in such a manner as to exclude the non-European world.'⁷ It was under 18th century international law that European sovereign states were able to acquire new territory by conquest, through

⁵ Julie Evans et al (eds), *Sovereignty: Frontiers of Possibility* (University of Hawaii Press, 2013) 21.

⁶ Sean Brennan, Brenda Gunn and George Williams, 'Sovereignty and its Relevance to Treaty-Making Between Indigenous Peoples and Australian Governments' (2004) 26(3) *Sydney Law Review* 307, 317.

⁷ Evans et al, above n 5, 22.

treaties, or by settlement of land deemed terra nullius. International law is a construct, therefore, of European imperialism. Paul McHugh writes that during the 17th and 18th centuries, British notions of sovereignty were ‘substantially feudal ... conceiving Crown *imperium* (right of governance) in a *jurisdictional rather than the absolutist and territorialized sense* that emerged in British practice and legal thought of the nineteenth century.’⁸

It was under the prevailing 18th century international doctrine of terra nullius that on 26 January 1788, Governor Arthur Phillip established the British penal colony of New South Wales at Sydney Cove after its earlier ‘discovery’ by Captain Cook. The belief at that time was ‘that all societies are bound by natural law to engage in agriculture and that a failure to do so would justify the application of sanctions on those societies — sanctions that could entail dispossession of their lands’.⁹ Australian Aboriginal people were seen as uncivilised, and the Australian continent as being uncultivated, ideal conditions for colonisation by imperialist Britain. The arrival of Phillip’s First Fleet signalled that ‘the English Crown acquired sovereignty over the land ... the laws of England, as far as they were applicable to local conditions, were brought across into the new colony.’¹⁰ Not only was New South Wales under new and permanent management but was also the recipient of English Law.¹¹ The early years of the colony, McHugh writes, was a time when Aboriginal status was defined by a ‘[f]luid combination of imperial practice expressed formally through royal instrumentation under ... letters patent ... and less formally through despatches to colonial functionaries.’¹²

B *Rejection of Aboriginal Sovereignty by Australian Courts*

In 1971, the Yolngu people of the Northern Territory, in *Milirrpum v Nabalco Pty Ltd*,¹³ sought to ‘assert peacefully, and through the courts, their rights to their ancestral

⁸ P G McHugh, *Aboriginal Societies and the Common Law* (Oxford University Press, 2009) 61 (emphasis added).

⁹ Evans et al, above n 5, 26.

¹⁰ Appleby, Reilly and Grenfell, above n 3, 35; see also McHugh, above n 8, 35–7.

¹¹ The term ‘officially received English Law’ is used here in a general sense. For a full discussion on the official reception of English Law into Australia, see, eg, Appleby, Reilly and Grenfell, above n 3, 31–59; see also McHugh, above n 8.

¹² McHugh, above n 8, 43.

¹³ *Milirrpum v Nabalco Pty Ltd and the Commonwealth* (1971) 17 FLR 141.

lands.’¹⁴ The Federal Government had leased Yolngu land to Nabalco for bauxite mining without prior consultation with the Aboriginal owners. *Milirrpum* sought declaratory relief in that the Yolngu were entitled to occupy the leased land without interference and that they had land rights based on a common law doctrine of Aboriginal title. *Milirrpum* was an attempt at overthrowing terra nullius. However, the Court’s hands were judicially tied by precedent. Terra nullius remained legally binding¹⁵ — ‘the doctrine of communal native title does not form and never has formed part of the law of any part of Australia.’¹⁶ *Milirrpum* was, nonetheless, pivotal in its recognition of customary law. There was judicial recognition for the first time of the extent and sophistication of Aboriginal society as a system of law and government:

The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives ... provided a stable order of society and ... remarkably free from the vagaries of personal whim or influence ... a system ... [of] a “government of laws, and not of men”.¹⁷

In 1992, *Mabo v Queensland (No 2)*¹⁸ went the next step of recognising that Indigenous customs and law and the rights it conferred on land were recognisable in the common law of Australia. It held that terra nullius was legal fiction, one that had been perpetuated for over 200 years since first European settlement in Australia in 1788. The real innovation of *Mabo (No 2)* was that it was the first time traditional laws and customs were found not to be separate, but part of Australia’s legal system.¹⁹

Using *Mabo (No 2)* as a catalyst, Australia’s indivisible Westphalian sovereignty was challenged in 1993 by *Coe v Commonwealth (No 2)* (the *Sovereignty case*).²⁰ The plaintiff, a member of the Wiradjuri people, claimed sovereignty by the Wiradjuri over their lands in south-central New South Wales. It was also claimed they were a domestic dependent nation and entitled to self-government and full rights over their traditional

¹⁴ John Hookey, ‘The Gove Land Rights Case: a judicial dispensation for the taking of Aboriginal Lands in Australia?’ (1972) 5 *Federal Law Review* 85, 114.

¹⁵ Terra nullius was legally recognised in Australian Courts in *Cooper v Stuart* (1889) 14 App Cas 286.

¹⁶ *Milirrpum v Nabalco Pty Ltd and the Commonwealth* (1971) 17 FLR 141, 245 (Blackburn J).

¹⁷ *Ibid* 267.

¹⁸ *Mabo v Queensland (No 2) (Mabo case)* (1992) 175 CLR 1.

¹⁹ See Samantha Hepburn, *Australian Property Law: Cases, Materials and Analysis* (Lexis Nexus Butterworths, 2nd ed, 2012) 225–27 [5.8]–[5.9].

²⁰ *Coe v Commonwealth (No 2)* (1993) 68 ALJR 110.

lands.²¹ This was rejected by Mason J in the High Court who held that the question of sovereignty was settled in Australia and was not open to legal challenge. All that was open to challenge was whether land rights, such as native title, had survived the assertion of British sovereignty.²²

Again, the rejection of Aboriginal sovereignty was confirmed in *Walker v New South Wales*.²³ The applicant, charged with a criminal offence at Nimbin, claimed he was a member of the Noonuccal Aboriginal nation of Stradbroke Island in Queensland and that the common law ‘is only valid in its application to Aboriginal people to the extent to which it has been accepted by them.’²⁴ The High Court found that ‘[t]here is nothing in *Mabo (No 2)* to provide any support at all for the proposition that criminal laws of general application do not apply to Aboriginal people.’²⁵ *Coe* and *Walker* clarified the limitations of *Mabo (No 2)*.

C Rethinking Absolute Sovereignty

Western notions of sovereignty, the legitimate power of a State to self-govern without external interference, are abstract and singular in nature, where the one source of power resides in Parliament, which has the authority to make laws which are imposed by force with a tendency to homogenise the society over which it governs. In more recent decades, however, notions of absolute sovereignty have been challenged. These challenges, particularly as a result of globalisation, have included a change to a more ‘realist concept’, where ‘sovereignty is divisible and capable of being shared or pooled across different entities or locations.’²⁶ Changes in the world order have challenged the idea of absolute sovereignty. States are not self-sufficient. The changes to absolute sovereignty from above opens the possibility of questioning absolute sovereignty from below. In fact, part of the new world order has been a growing consciousness of the rights of Indigenous peoples. The following section considers Indigenous concepts of

²¹ Ibid [195]; see also Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 5th ed, 2010) 180–181.

²² *Coe v Commonwealth (No 2)* (1993) 68 ALJR 110, 193.

²³ *Walker v New South Wales* (1994) 182 CLR 45.

²⁴ Ibid; see also Blackshield and Williams, above n 21, 181–183.

²⁵ *Walker v New South Wales* (1994) 182 CLR 45, [50] (Mason CJ).

²⁶ Brennan, Gunn and Williams, above n 6, 312.

sovereignty and self-government which may either compete with or become accommodated within the State.

D *Indigenous Concepts of Sovereignty*

At colonisation in 1788 it has been estimated that the Aboriginal population of Australia was between 315 000 and over one million.²⁷ Linguists Walsh and Yallop estimate that ‘around 250 distinct languages were spoken at first (significant) European contact ...[with most languages having] several dialects, so that the total number of named varieties would have run to many hundreds.’²⁸ Although each group was a separate identity, all shared beliefs in creation stories of mythical ancestral beings who created the landforms and the natural order of laws, commonly referred to as the ‘Law’ or ‘Dreaming’.²⁹

1 *The Dreaming*

The concept of Aboriginal ‘Law’ or ‘Dreaming’ can be difficult to grasp for non-Aboriginal people — many see the Dreaming as ‘myth, legend, folklore.’³⁰ Karen Martin (Booran Mirraboopa), a Noonuccal woman from Queensland, describes her own ontology as being ‘the land, waterways, skies, spiritual and law systems of the Quandamooka people’.³¹ She believes ‘that country is not only the Land and People, but is also the Entities of Waterways, Animals, Plants, Climate, Skies and Spirits ... [where] one Entity should not be raised above another, as these live in close relationship with one another ... People are no more or less important than other Entities.’³²

²⁷ Australian Bureau of Statistics, 1301.0, ‘Year Book Australia, 2008’.
<<http://www.abs.gov.au/ausstats/abs@.nsf/0/68AE74ED632E17A6CA2573D200110075?opendocument>>.

²⁸ Michael Walsh and Colin Yallop, *Language and Culture in Aboriginal Australia* (Aboriginal Studies Press, 2012) 1.

²⁹ See generally W H Edwards, *An Introduction to Aboriginal Societies* (Social Science Press, 2nd ed, 2004).

³⁰ See, eg, Ambelin Kwaymullina, ‘Seeing the Light: Aboriginal Law, Learning and Sustainable Living in Country’ (2005) 6(11) *Indigenous Law Bulletin* 12.

³¹ Karen Martin (Booran Mirraboopa), ‘Ways of knowing, being and doing: A theoretical framework and methods for indigenous and indigenist re-search’ (2003) 27(76) *Journal of Australian Studies* 203, 206.

³² *Ibid* 207.

Irene Watson, a noted Aboriginal academic, paints a picture of the Dreaming from the perspective of her Tangane-kald and Meintangk peoples, the traditional owners of the Coorong and lower southeast of South Australia:

I want to begin with a story and a return to the beginning when there lived a giant frog. This frog drank all the water until there was none left. The creeks, lagoons, rivers, lakes, and even the oceans dried up. As the animals grew thirsty they came together to find a way to get the frog to release the waters back to the land. They decided the only way was to make the frog laugh, and they did this. When the frog laughed it released the water, and then the community realised it had to turn the large frog into a smaller one, so that it could no longer dominate and would be brought to share equally with all other living beings.³³

Although used metaphorically by Watson, comparing the large frog to the greed of British colonisation and settlement, the story is also representative of many Indigenous Creation Dreaming stories relating to geographical formations. The Dreaming, however, relates to more than just relationships between ancestral beings and geographical features. To Aboriginal people, the Dreaming (called *Tjukurpa* by Pitjantjatjara Anangu of the APY Lands) was ‘a period in which dramatic events took place which shaped the environment, its inhabitants and their way of life.’ It is ‘not a shadowy reflection of real life, but is envisioned as the reality itself from which life, as we experience it, is derived.’³⁴ The Dreaming establishes laws of how Aboriginal people connect with their land; where social organisation is by the natural order of things — by ancestry, blood or kinship groups — it forms the basis for a traditional Aboriginal understanding of sovereignty.³⁵ From an Anangu perspective, anthropologist Maggie Brady states:

The Law, and the practice of the Law has, from their point of view, ‘always’ existed, or is so unimaginably old that it is automatically accepted to be ‘true’. The Law is known

³³ Irene Watson, ‘Aboriginal Laws and the Sovereignty of *Terra Nullius*’ (2002) 1(2) *borderlands e-journal* [1].

³⁴ Edwards, above n 29, 16–18.

³⁵ See generally Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge, 2015); see also Martin (Mirraboo-pa), above n 31.

in Pitjantjatjara as *tjukurrpa*, ‘Dreaming’, said by them to be immutable. From their point of view the Law ‘works’ and needs no further elaboration.³⁶

Watson describes the law of her people as being ‘naked or “raw”, undressed from the baggage of colonialism ... [being] unlike the colonial legal system imposed upon us, for it was not imposed, but rather lived.’³⁷ Watson further states that ‘[l]aw is lived, sung, danced, painted, eaten and in the walking of ruwe [the territories of Australian First Nations peoples].’³⁸ Unlike abstract western notions of sovereignty, concepts of Indigenous sovereignty are inclusive, not singular, and do not rely on ‘some hierarchical god, represented by a monarch’ as the head of state.³⁹

2 *Mabo (No 2) and the Recognition of Aboriginal Customary Law*

With *terra nullius* extinguished by *Mabo (No 2)*, the basis for Australian colonisation is now under serious question as argued by Watson:

What legitimises your entry? Do you still require the consent of the natives? And if we give it to you now what meaning will you or I give to that agreement? For who will hold the colonising state and its growing globalised identity to honour and respect our laws, territories and right to life? No one has in the past.⁴⁰

While *Mabo (No 2)* clearly acknowledged the link between land rights and Indigenous traditional law and custom, land rights under the *Native Title Act*⁴¹ ‘are treated as secondary to the property interests of all other Australians,’⁴² evidenced by the extinguishment of native title where conflicts arose. Watson argues that ‘the injustice of *terra nullius* was replaced by a *new* form – the power of extinguishment.’⁴³

Aboriginal academic Larissa Behrendt maintains that despite the 1967 referendum’s changes to the *Constitution*,⁴⁴ and the subsequent High Court legal challenges of *Kruger*

³⁶ Maggie Brady, *Dealing with disorder: Strategies of accommodation among the southern Pitjantjatjara, Australia* (Master of Arts Thesis, Australian National University, 1987) 87.

³⁷ Watson, above n 35, ch 2.

³⁸ Ibid.

³⁹ Watson, above n 34, [49].

⁴⁰ Ibid [4].

⁴¹ *Native Title Act 1993* (Cth).

⁴² Evans et al, above n 5, 168.

⁴³ Watson, above n 33 [25] (emphasis in original).

⁴⁴ For an overview of the 1967 referendum, see National Archives of Australia, *The 1967 referendum - Fact sheet 150* Australian Government <<http://www.naa.gov.au/collection/fact-sheets/fs150.aspx>>.

*v Commonwealth*⁴⁵ and *Kartinyeri v Commonwealth*,⁴⁶ ‘[t]he cumulative effect of this legal framework is that we have a legal system that still leaves much faith [regarding Aboriginal rights] in the benevolence of government.’⁴⁷ Evidence of the failure of such benevolence, she argues, is provided by the fact that the three times the *Racial Discrimination Act*⁴⁸ has been suspended were ‘all about Aboriginal people — the Hindmarsh Island Bridge dispute, the Native Title Amendment Act, and the Northern Territory Intervention.’⁴⁹

Mabo (No 2), as a form of common law recognition, provides limited recognition of native title, but unfortunately, it reveals the fragility of Indigenous sovereignty under the current law — the inability of Aboriginal people to control extinguishment under the *Native Title Act*⁵⁰ cannot be recognised as sovereignty.

In contrast to the centralist power-based western notion, contemporary Indigenous concepts of sovereignty are many and varied. As discussed by Brennan et al, there are notions of prior, historical sovereignty as the First Nations Peoples of Australia, where sovereignty was never validly extinguished; and sovereignty as the capacity for self-determination in political, social and economic spheres, a ‘verbal approximation of an innate sense of identity and of legal and political justice ... [having] a structural as well as rhetorical resonance.’⁵¹

3 *The Fight for Land Rights*

The differences between the various types of ownership and possession of land (real property) are worthy of mention at this point. Although a legally complex subject,⁵² under general Australian property law, the Crown retains the underlying radical title to

⁴⁵ *Kruger v Commonwealth* (1997) 190 CLR 1 — also known as the *Stolen Generation Case*, involving the implied right of legal equality.

⁴⁶ *Kartinyeri v Commonwealth (The Hindmarsh Island Bridge Case)* (1998) 195 CLR 337 — a controversial case involving Aboriginal cultural tradition and property rights.

⁴⁷ Evans et al, above n 5, 166.

⁴⁸ *Racial Discrimination Act 1975* (Cth).

⁴⁹ Evans et al, above n 5.

⁵⁰ *Native Title Act 1993* (Cth).

⁵¹ Brennan, Gunn and Williams, above n 6, 313–317.

⁵² See, eg, Australian Law Reform Commission, ‘Traditional Rights and Freedoms—Encroachments by Commonwealth Laws (ALRC Interim Report 127)’ (2015) ch 7; see also Hepburn, above n 19.

land.⁵³ Freehold title (or title in fee simple) is title to land in perpetuity.⁵⁴ Beneficial title involves the possession and/or use or enjoyment of land despite it being owned by another as, for example, in the case of leased property. However, native title creates yet another subset of land possession which sits below freehold title and has many of the rights of beneficial title. Freehold title extinguishes the beneficial title of native title. Native title is generally a bundle of rights on land.⁵⁵ Inalienable freehold title refers to land that cannot be purchased, sold, mortgaged or forfeited and is a more robust title than native title.⁵⁶ While state and Federal laws still apply to land held under freehold or native title, there are exceptions. With native title, *Yanner v Eaton*⁵⁷ is an example of a case where the High Court held that despite there being ‘no exception in favour of Aborigines who killed native animals for domestic consumption’,⁵⁸ the Queensland *Fauna Conservation Act*⁵⁹ did not extinguish the native title rights of the appellant to hunt for juvenile crocodiles, the original offence with which he was charged. While this case involved questions of the legal interpretation of Crown property, it nevertheless demonstrates a point of strength in native title.

As previously mentioned, *Milirrpum* was the first land rights case in Australia and although Blackburn J denied the Yolngu’s land rights claim there was, for the first time, judicial recognition of Aboriginal customary law.⁶⁰ *Milirrpum* led to the 1973 Woodward Commission on Aboriginal Land Rights and was the major catalyst towards Northern Territory land rights.⁶¹ Justice Woodward’s second report (1974) recommended the formation of Aboriginal Land Commissions and returning certain pastoral leases and Crown Land to Aboriginal Communities as inalienable freehold title. It was the precursor to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth),

⁵³ See, eg, Ulla Secher, ‘The Crown’s Radical Title and Naive Title: Lessons from the Sea’ (2011) 35(2) *Melbourne University Law Review* 523, 525–28.

⁵⁴ Hepburn, above n 19, 230–36, [5.10]–[5.17].

⁵⁵ See, eg, *Western Australia v Ward* (2002) 213 CLR 1.

⁵⁶ See, eg, *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA) s 17.

⁵⁷ *Yanner v Eaton* (1999) 201 CLR 351.

⁵⁸ Ron Levy, ‘High Court Upholds Hunting Rights in Yanner Appeal: Yanner v Eaton’ (2000) 4(26) *Indigenous Law Bulletin* 17.

⁵⁹ *Fauna Conservation Act 1974* (Qld).

⁶⁰ *Milirrpum v Nabalco Pty Ltd and the Commonwealth* (1971) 17 FLR 141, 245 (Blackburn J).

⁶¹ Parliament of Australia, ‘Royal Commissions and Commissions of Inquiry’ <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Browse_by_Topic/law/royalcommissions#1970>.

which has seen some 50 per cent of Northern Territory land now being held under inalienable native title.⁶²

In 1981, following a protracted struggle, inalienable freehold title to 103 000 square kilometres of land was granted to South Australian Pitjantjatjara and Yankunytjatjara Anangu over the APY Lands.⁶³ In 1984, a similar area of land south of the APY Lands was granted to southern Pitjantjatjara Anangu under the *Maralinga Tjarutja Land Rights Act*.⁶⁴ The 200 000 square kilometre combined land area captured by these two statutes provides Anangu with inalienable freehold title to 20 per cent of South Australia's landmass of 983 482 square kilometres. The grant of inalienable freehold title to the APY Lands came with an expectation by Anangu of a continuation of independent practice of their law and culture within the broader framework of the law.⁶⁵ There is the potential, therefore, for Anangu customs and law to play a significant role in their lives, including their relationship within the South Australian criminal justice system. In other words, the APY Land Rights Act provides a framework for Anangu self-determination.

Milirrpum was a claim to inherent Aboriginal rights, while in 1992, *Mabo (No 2)* recognised a new form of land right under Australian law. Both cases contained valuable recognition of Aboriginal customary law. The rights conferred by subsequent legislation are intrinsically limited and recognition alone is not a grant of sovereignty. Importantly, though, the substantial grants of inalienable freehold land title throughout Australia offer a platform for the development of Indigenous self-government and sovereignty,⁶⁶ particularly under a realist or popular sovereignty model as discussed in this chapter. Just as importantly, given the nature of our *Constitution*, where power and

⁶² See, eg, McHugh, above n 8, 403–4.

⁶³ *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA); see generally Phillip Toyne and Daniel Vachon, *Growing Up the Country: The Pitjantjatjara struggle for their land* (McPhee Gribble / Penguin, 1984); see also McHugh, above n 8, 407.

⁶⁴ *Maralinga Tjarutja Land Rights Act 1984* (SA).

⁶⁵ See South Australia, *Parliamentary Debates (second reading speech Pitjantjatjara Land Rights Bill)*, House of Assembly, 23 October 1980, 1387 (David Tonkin); see also generally Toyne and Vachon, above n 62.

⁶⁶ See, eg, Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) and the formation in the Northern Territory of Aboriginal Land Councils arising from the 1973 Woodward Commission of Inquiry, above n 61. The Northern Territory Land Councils have afforded a degree of sovereignty for traditional Aboriginal land owners who now hold inalienable freehold title to nearly 50 per cent of the Northern Territory (see, eg, Northern Land Council Internet site <<https://www.nlc.org.au/about-us/our-history>>).

sovereignty are already shared between the Commonwealth and the States, such a model is already consistent with Australia's sovereignty.⁶⁷

4 Self-determination

On a simplistic level, self-determination is the process by which one controls his or her life. From a collective perspective, the Oxford Dictionary defines self-determination as '[t]he process by which a country determines its own statehood and forms its own allegiances and government.'⁶⁸ Jill Webb, lawyer and Aboriginal rights activist, argues that self-determination is the most fundamental of all human rights, and that 'no other right overrides it. Without this group or individual right, no other human right could be secured, since the group would be unable to determine for its individual members under what political, social, cultural, economic and legal order they would live.'⁶⁹ From an international law perspective, dialogue on self-determination commenced soon after WWI.⁷⁰

In 2001, Behrendt explained that the Indigenous concept of self-determination include:

everything from the right not to be discriminated against, the rights to enjoy language, culture and heritage, our rights to land, seas, waters and natural resources, the right to be educated and to work, the right to be economically self-sufficient, the right to be involved in decision-making processes that impact upon our lives and the right to govern and manage our own affairs and our own communities.⁷¹

Principles of Indigenous self-determination do not necessarily mean secession or separate sovereignty. They are 'a technique or method, a continuum of rights, a plethora of possible solutions'.⁷² Behrendt argues that Indigenous people should define self-determination as a 'vision of increased Indigenous autonomy within the structures of the state'⁷³ — in other words, getting things done despite the location of sovereignty.

⁶⁷ See generally, Reilly, above n 4.

⁶⁸ See Oxford Dictionary online < <https://en.oxforddictionaries.com/definition/us/self-determination>>.

⁶⁹ Jill Webb, 'Indigenous People and the Right to Self Determination' (2012) (13) *Journal of Indigenous Policy* 75, 75.

⁷⁰ Ibid 75, 78–79.

⁷¹ Larissa Behrendt, 'Indigenous Self-determination in the age of Globalization' (2001) 3 *Balay: Culture, Law and Colonialism* 177, 2.

⁷² Webb, above n 69, 89, citing Law Book Company, *Laws of Australia*, vol 1 (at 23 August 2009) 1 *Aborigines and Torres Strait Islanders*, '1.7 International Law' [66].

⁷³ Ibid, citing Behrendt, above n 71, 2.

Although not as absolutist as Westphalian sovereignty, self-determination does, nevertheless, have resonance with a key feature of many contemporary Indigenous ideas of sovereignty. Behrendt offers clarity, where she argues:

Research in Australia and North America has detailed that better socioeconomic outcomes are achieved when Indigenous people are involved in the setting of priorities within their community, the development of policy, the delivery of services, and the implementation of programs ... *can be characterized as self-determination and, when control is given centrally to Aboriginal people without constraint, can be a form of sovereignty.*⁷⁴

Behrendt's characterisation of Indigenous sovereignty, as associated with self-determination, is consistent with a realist or popular sovereignty model. It raises the question directly of the extent to which Aboriginal people should rely on the benevolence of the Government.

Following the previous Federal Government's failed decades-long program of assimilation, self-determination became an official Government policy under Labor in 1972. In a 1973 speech, Prime Minister Whitlam stated:

The basic object of my Government's policy is to restore to the Aboriginal people of Australia their lost power of self-determination in economic, social and political affairs ... my Government is anxious that 200 years of despoliation, injustice and discrimination have seriously damaged and demoralised the once proud Aboriginal people.⁷⁵

These lofty ambitions hint at a form of Indigenous decolonisation related to the promotion of 'the *rights* of Indigenous peoples to take control of their own governance, and to determine their own destiny, while at the same time remaining within the Australian polity — a difficult and problematic balancing act.'⁷⁶ However, this thesis argues that such ambitions must be pursued given the broader interpretation of political sovereignty previously discussed. The fact that Aboriginal claims to a separate

⁷⁴ Larissa Behrendt, 'Aboriginal Sovereignty: A Practical Roadmap' as contained in Evans et al, above n 5, 171 (emphasis added).

⁷⁵ Heather McRae et al, *Indigenous Legal Issues, Commentary and Materials* (Lawbook, 4th ed, 2009) 41 [1.590].

⁷⁶ *Ibid* 42 (emphasis in original).

sovereignty have persisted across time suggests that a greater level of autonomy is structurally required and must be addressed in law.

The gains for Indigenous people under the Labor era were substantial with the establishment of the federal Department of Aboriginal Affairs, incorporation of Indigenous organisations, and the National Aboriginal Consultative Committee, which, in 1990, transformed into the Aboriginal and Torres Strait Islander Commission (ATSIC).⁷⁷ ATSIC held representative and administrative functions, advising government and establishing funding priorities. With an annual budget of over \$1 billion, ATSIC represented a ‘significant shift in power from government to an elected body with decision-making power over Aboriginal programs’⁷⁸

Of equal importance was the 1975 enactment of the *Racial Discrimination Act* (RDA).⁷⁹ Until this time, there was no protection from government action against the removal of specific Aboriginal rights and interests. The legislation resulted in the government being constrained in their treatment of Aboriginal rights and interests like all other rights and interests. Special rights, such as native title, were also protected by the RDA. *Mabo (No 2)* highlighted the importance of the RDA regarding land rights. From 1975 to 1992, extinguishment of native title was subject to compensation under the RDA. Although extinguishment was compensable, extinguishment itself was irreversible. Section 10 of the RDA prohibited future extinguishment of native title after *Mabo* had declared its existence in 1992. However, pursuant to s 8, the Federal Government can and has suspended the operation of the RDA. As described by Behrendt, the three times the RDA has been suspended ‘were all about Aboriginal people’,⁸⁰ clearly demonstrating the limitations of the legislation.

In reality, the policies of self-determination were severely hampered by short-term funding and interference by often multi-layered government bureaucracies, resulting in many Indigenous communities remaining firmly under the government heel.⁸¹

Whitlam’s policy resulted in ‘consultative self-determination’, where disempowerment

⁷⁷ Established under the now repealed *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth); see, also, Webb, above n 69, 93–4.

⁷⁸ Webb, above n 69, 94, citing McRae et al, above n 73, 165

⁷⁹ *Racial Discrimination Act 1975* (Cth).

⁸⁰ Evans et al, above n 5, 166.

⁸¹ See generally, Webb, above n 69, 95

and welfare-dependency remained, particularly within traditionally-oriented communities in remote areas of Australia.⁸² Self-determination was described as a ‘cruel hoax’, Aboriginal people ‘were bequeathed the administrative mess that non-Aboriginal people had left and were ... told to fix it up’.⁸³ The paternalism of the assimilation era, where communities were ruled by the often iron-fisted approach of community superintendents,⁸⁴ was replaced by community advisors:

many with no obvious skills apart from their familiarity with the English language and bureaucratic procedures. Far from gaining self-determination many communities suffered a new style of dependency but this time they were ‘consulted’--they were always consulted--on everything, but somehow the consultation process rarely seemed to result in Aboriginal priorities and decisions being adopted in practice.⁸⁵

5 *Practical Reconciliation — a new Government Era*

In 1997, the Coalition Government of Prime Minister Howard replaced the policy of self-determination, which had commenced in the 1970s, with one of ‘mutual obligation’, otherwise known as ‘practical reconciliation’.⁸⁶ Under practical reconciliation, Indigenous people were ‘expected to take responsibility for improving their own situation’, placing them ‘in an invidious situation, where government asked them to take more responsibility yet removed the decision-making structures and resources that make this possible.’⁸⁷ It was a return to ‘welfarism (social, education, and welfare programmes)’,⁸⁸ and a period of self-management rather than self-determination. Practical reconciliation was a political assumption where ‘rights alone cannot improve levels of disadvantage.’⁸⁹ The present-day situation is further discussed within the next section of this chapter.

⁸² Royal Commission into Aboriginal Deaths in Custody (RCIADIC), *National Report*, Vol 4, (1991) 40 [27.6.3].

⁸³ Ibid 39, [27.6.1].

⁸⁴ For example, in 1978 as a police officer, I successfully charged the superintendent of Amata for serious firearm offences. It had been reported that he often conducted his official duties in an intimidatory manner while wearing an exposed revolver. He was convicted and removed from Amata.

⁸⁵ RCIADIC, above n 80, 40 [27.6.3].

⁸⁶ The process of reconciliation actually commenced under Prime Minister Hawke’s Labor Government with the *Council for Aboriginal Reconciliation Act 1991* (Cth).

⁸⁷ Webb, above n 69, 96; in 2005, the Howard Government abolished ATSIC.

⁸⁸ McHugh, above n 8, 343.

⁸⁹ Webb, above n 69.

This section has demonstrated a range of policies towards Aboriginal and Torres Strait Islander peoples at the national level, which reflect, extend, and sometimes oppose legal developments. The diversity of approaches, backed by a varying terminology, has led to a situation at the beginning of the 21st century in which there is no clear rationale underpinning Indigenous policy. This is evident in the administration of criminal justice in the APY lands. The original promise of autonomy accompanying the grant of inalienable freehold title has been followed by an expanded presence of mainstream legal and administrative processes affecting the lives of Anangu. The evolution of criminal justice demonstrates how these practices have lost a connection to their original purpose: to assist Anangu to maintain their traditional ways of life.

III LEGAL PLURALISM

A Introduction

As discussed, Australia is a sovereign nation with authority vested in a constitutional power-sharing structure between Federal and State governments. In the following section, the focus will be on the possibility of maintaining an authority to be self-determining. The mechanisms of legal pluralism can facilitate the self-determination of different groups within a single sovereignty by focusing on the creation of shared jurisdictional spaces; particularly within the APY Lands, the subject of this thesis.

John Griffiths defines legal pluralism as the existence of more than one governing legal order in a particular jurisdiction or country.⁹⁰ Legal pluralism is a concomitant of cultural, structural and social pluralism, underpinned by self-regulatory governance.⁹¹ The prevailing ideology of legal centralism, in which only one form of legal governance is recognised, has hindered accurate interpretations of legal reality. In Australia, for example, only one form of law is officially recognised even though legal pluralism has been a fixture of the British colonial experience.⁹² Legal centralism overlooks the fact that a subset of the population, Indigenous Australians, practiced tribal law prior to, and at the time of settlement, and more relevantly, they practice tribal law now. Griffiths

⁹⁰ John Griffiths, 'What is Legal Pluralism?' (1986) (24) *Journal of Legal Pluralism* 1.

⁹¹ Ibid 20.

⁹² See, eg, McHugh, above n 8.

concludes that legal pluralism is a *fact* compared with the myth of legal centralism.⁹³ Or as Brian Tamanaha puts it, pluralism is everywhere.⁹⁴ It exists in our democratic society — in areas of politics, economics, religion, society and law. Griffiths identified levels of pluralism in legal systems, ranging from soft legal pluralism, in which a dominant legal system is highly influenced by pre-existing or alternative legal systems, to more extensive pluralism, in which two or more legal systems co-exist.

In Australia there are Federal and state laws, and local government rules and regulations. We have multilayered laws and judicial systems to deal with civil and criminal matters, and a similarly layered system for matters regarding discrimination, workplace safety, employment, and property disputes, to mention but a few. Even our social and religious endeavours are governed by regulatory bodies of one form or another. Indigenous customs and laws govern many of Australia's Aboriginal people, particularly those living in traditionally-oriented remote communities.⁹⁵

B *Legal Pluralism and Indigenous Customary Law*

Legal pluralism provides a structure to consider Australian Indigenous governance. It places emphasis on the system of laws that, regardless of the formal position, really govern the behaviour of groups of people.⁹⁶ Since Australia is already accustomed to sharing Federal and state constitutional sovereignty, Alexander Reilly states that 'there is familiarity with sharing power and responsibility over the resources of the state at the highest level.'⁹⁷ Given this familiarity with a two-tiered federal *Constitution*, could it not be argued that there is room for a third tier, that of more formal recognition of Indigenous people and, where appropriate, their customs and law?

James Tully writes that 'a constitution can be both the foundation of democracy and, at the same time, subject to democratic discussions and change in practice',⁹⁸ thereby

⁹³ Griffiths, above n 90.

⁹⁴ Brian Z Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30 *Sydney Law Review* 375, 375.

⁹⁵ For example, the Pitjantjatjara and Yankunytjatjara peoples of the APY Lands in north-west South Australia.

⁹⁶ See, eg, Reilly, above n 4.

⁹⁷ *Ibid* 412.

⁹⁸ James Tully, *Strange multiplicity: Constitutionalism in an age of diversity* (Cambridge University Press, 8th ed, 2007) 29.

forming the basis for political and legal pluralism acceptable to all cultures within a diverse modern and democratic society. These ideals sit well with the position of this thesis that Australian Aboriginal cultures are not fixed at some historical point in time but are dynamic, just as Australia is no longer a set of small colonies.

At present, legal pluralism in Australia, particularly constitutional reform, is at the forefront of discussions about the relationship of Aboriginal and Torres Strait Islander (ATSI) peoples and the State. Following the 2012 report of the Expert Panel on the Recognition of ATSI Peoples in the Constitution, instituted by Gillard Government, Prime Minister Abbott established the Joint Select Committee on Constitutional Recognition of ATSI Peoples in June 2015. In December 2015, following the findings of this committee, Prime Minister Turnbull established the Referendum Council.⁹⁹ Between December 2016 and May 2017, the Council held nation-wide Regional Dialogues to discuss constitutional recognition with ATSI peoples. In May 2017, a First Nations Convention was held at Uluru in the Northern Territory, culminating in the ‘Uluru Statement from the Heart’, recommending an ATSI Voice to Parliament and a Makarrata Commission, or treaty-making process, to be set up in legislation.¹⁰⁰ The statement referenced the Dreaming as the source of sovereignty:

This [ATSI] sovereignty is a *spiritual notion: the ancestral tie between the land, or ‘mother nature’, and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be reunited with our ancestors. This link is the basis of the soil, or better, of sovereignty.* It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown.¹⁰¹

A Joint Select Parliamentary Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples is currently considering a proposal for constitutional recognition based on the Uluru statement.¹⁰²

⁹⁹ Referendum Council, *Final Report of the Referendum Council* (2017) iii.

¹⁰⁰ Media Statement, Referendum Council, ‘Aboriginal and Torres Strait Islander Peoples from across Australia make Historic Statement’, 26 May 2017.

¹⁰¹ Referendum Council, above n 99 — ‘Uluru Statement from the Heart’ (the Makarrata) (emphasis in original).

¹⁰² See Parliament of Australia, Parliamentary Business Internet site <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Constitutional_Recognition_2018>.

There can be no doubt that Indigenous cultural pluralism exists within Australian society but since the early days of colonialism, our political and legal systems have struggled with its full recognition. Even then, what recognition it has received has been fragmentary and then reduced to legislative instruments constructed from a non-Indigenous perspective, in conflict with the inherent independence of Indigenous governance. Furthermore, Reilly suggests, there is no simple definition of Indigenous governance, a concept which varies ‘in different contexts and at different levels.’¹⁰³

Politically, it seems that as a nation we are content with subtle forms of continued subjugation of Aboriginal people, exemplified by the *Native Title Act*, where land rights have been granted but are subject to highly restrictive requirements, or as Behrendt states, the benevolence, of the Crown.¹⁰⁴ Even when inalienable freehold title has been granted to Aboriginal people, there are continued struggles between the practical needs of the Indigenous owners and the overarching political and legal control by the state.¹⁰⁵ As argued by Aboriginal lawyer and academic Megan Davis, ‘Indigenous interests have been accommodated in the most temporary way by statute. What the state gives, the state can take away, as has happened with ATSIC, the Racial Discrimination Act and native title.’¹⁰⁶

The discussions on legal pluralism by Tully and Reilly dovetail well with my own contention that, given the plethora of case law immediately following colonisation,¹⁰⁷ and continuing to the present¹⁰⁸ — and specifically with the recognition of Indigenous customary law in *Milirrpum* and more so in *Mabo (No 2)*¹⁰⁹ — legal pluralism is already an established legal fact in Australia. As will be seen in chapters 4 and 5 of this

¹⁰³ Reilly, above n 4, 427 — the different levels are those of community, where there is importance in recognising traditional law and custom and the customary decision-making process, to that of the nation, where there is a need for recognition of Indigenous administrative structures.

¹⁰⁴ Behrendt, above n 74, 166.

¹⁰⁵ See, eg, those struggles associated with Ministerial control of the Executive Board under the *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA), Part 2, Division 4 amendments of 2014; see also Deirdre Tedmanson, *Shifting State Constructions of Anangu Pitjantjatjara Yankunytjatjara: Changes to the South Australian Pitjantjatjara Land Rights Act 1981-2001* (PhD Thesis, Australian National University, 2016).

¹⁰⁶ Megan Davis, ‘A woman's place...’ (2009) 24 *Griffith Review* 156, 157.

¹⁰⁷ See, eg, *R v Larry* [1847] SA SupC 39 (15 March 1847); *R v Murrell and Bummaree* [1836] NSWSupC 35 (5 February 1836); *R v Wiwar* [1842] WA SupC 7 (3 January 1842).

¹⁰⁸ See, eg, *R v Anunga* (1976) 11 ALR 412; *R v Fernando* (1992) 76 A Crim R 58; *Bugmy v The Queen* [2013] HCA 37; *Western Australia v Gibson* (2014) WASC 240.

¹⁰⁹ *Milirrpum v Nabalco Pty Ltd and the Commonwealth* (1971) 17 FLR 141; *Mabo v Queensland (No 2)* (*Marbo case*) 175 CLR 1.

thesis, there already exists an interaction between the Australian legal system and APY Anangu. The APY Court readily cancels court circuits during times of traditional ceremonies and the police have clearly stated their recognition of Anangu self-determination.

IV QUESTIONS OF SOVEREIGNTY AND LEGAL PLURALISM IN THE ADMINISTRATION OF CRIMINAL JUSTICE IN INTER SE ABORIGINAL DISPUTES

An examination of early colonial cases reveals that questions of sovereignty were legally settled within the first 40 years of settlement.¹¹⁰ Despite this recognition of formal British sovereignty, courts nevertheless looked for alternative solutions, particularly so in early *inter se* matters, where courts showed a degree of ambivalence. It is evident in a number of early New South Wales *inter se* decisions that courts were struggling with issues of jurisdiction and legal pluralism. These cases include *R v Ballard*,¹¹¹ *R v Murrell and Bummaree*¹¹² and *R v Bonjon*.¹¹³ The following sections provide a brief historical overview of early colonial legislation and cases to gain an understanding of the problems which now present themselves in the APY Lands. As will be seen, the questions raised by early cases remain the topic of much judicial debate today.

A Early Colonial Cases and Legislation

At settlement, no criminal legislation was in force and legal texts or even relevant statutes were thin on the ground — only the common law of England, law derived from custom and judicial precedent, rather than of legislation, was brought to the new colony

¹¹⁰ See *R v Lowe* [1827] NSWKR 4; [1827] NSW SupC 32; see also *R v Tommy* [1827] NSW SupC 70 (Forbes CJ) (24 November 1827).

¹¹¹ *R v Ballard or Barrett* [1829] NSW SupC 26; sub nom. *R v Dirty Dick* (1828) NSW Sel Cas (Dowling) 2 (Forbes CJ, Dowling J) (13 June 1829) <http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1829/r_v_ballard_or_barrett/>.

¹¹² *R v Murrell and Bummaree* (1836) 1 Legge 72; [1836] NSW SupC 35 (Forbes CJ) (5 February 1836) <http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1836/r_v_murrell_and_bummaree/>.

¹¹³ *R v Bonjon* [1841] NSW SupC 92 (Willis J) (16 September 1841). <http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/port_phillip_district/1841/r_v_bonjon/>; see also McHugh, above n 8, 159, 64, for an overview of early New South Wales struggles regarding *inter se* cases.

of New South Wales.¹¹⁴ Imperial instructions issued to the early governors of New South Wales related only to conciliation and protection of Aboriginals.¹¹⁵ Protection, for at least the first 50 years, was somewhat nebulous — as Aboriginal people were not of the Christian faith they were unable to provide sworn evidence before a court.¹¹⁶ Despite the British Parliament enacting *The (Colonies) Evidence Act*¹¹⁷ in 1843, allowing for British Colonies to enact laws to allow unsworn evidence to be received in colonial civil and criminal courts, New South Wales did not enact such laws until 1876.¹¹⁸ The colonies of Western Australia and South Australia were more progressive, with Western Australia passing the *Aborigines Evidence Act (4 & 5 Vict. No 22) 1841* (WA) and *Aborigines Evidence Act (7 Vict. No 7) 1843* (WA) after the colony was empowered to pass its own legislation. South Australia enacted the *Aboriginal Evidence Ordinance Bill* in 1844.¹¹⁹

Until the *Australian Courts Act*¹²⁰ was enacted on 25 July 1828, the date at which the laws of England would be applied to New South Wales and Van Diemen's Land, all criminal matters in the new colony had been heard and determined by a military court under the *New South Wales Courts Act 1787* (UK), overseen by the colony's governor. The first Chief Justice of New South Wales, Sir Francis Forbes, was not appointed until May 1824 under the *Charter of Justice 1823* (UK).¹²¹

Although the questions of sovereignty had been established relatively early in Australia, as discussed above, questions relating to legal pluralism remained throughout each of the colonies. To illustrate these problems, a brief discussion is presented in the

¹¹⁴ Heather Douglas and Mark Finnane, *Indigenous Crime and Settler Law: White Sovereignty after Empire* (Palgrave Macmillan, 2012) 129, 37.

¹¹⁵ See, eg, *Governor Phillip's Instructions 25 April 1787* <http://www.foundingdocs.gov.au/resources/transcripts/nsw2_doc_1787.pdf>.

¹¹⁶ David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (Cambridge University Press, 1991) 17–18.

¹¹⁷ *The (Colonies) Evidence Act, 1843* 6 & 7 Vic. c 22 (Imperial).

¹¹⁸ Russell Smandych, 'Contemplating the Testimony of 'Others': James Stephen, The Colonial Office, and the Fate of Australian Aboriginal Evidence Acts, Circa 1839-1849' (2006) 10 *Legal History* 97, 119.

¹¹⁹ See *ibid* 121–122; see also Alan Pope, *One law for all?: Aboriginal people and criminal law in early South Australia* (Aboriginal Studies Press, 2011) 44.

¹²⁰ *Australian Courts Act 1828* (UK).

¹²¹ See, generally, The Prosecution Project, New South Wales Courts <<https://prosecutionproject.griffith.edu.au/other-resources/new-south-wales-courts/>>; see also National Library of Australia (Trove) <<http://trove.nla.gov.au/newspaper/article/2182990>>.

following sections regarding the colonial jurisdictions of Western Australia and South Australia.

Judicially, Western Australia proceeded in a similar manner to New South Wales regarding the treatment of Aboriginal people. It appears, though, that initially Western Australian settlers did not hesitate to establish ownership of the settlement and nearby country by force, demonstrated by the ‘Battle of Pinjarra’ in 1834 in which a number of Aboriginals were killed.¹²² Like New South Wales, Western Australia sought to protect Crown sovereignty when Aboriginal people contested their authority. As reported by Ann Hunter,¹²³ the earliest case in which the amenability of Aboriginal people to British law, in matters related to offences committed against white settlers, was confirmed in *R v Gear*.¹²⁴

The earliest *inter se* case in Western Australia appears to be that of *R v Helia* in 1838,¹²⁵ a case involving the spearing murder of an Aboriginal woman by an Aboriginal man.¹²⁶ Although there was no debate ‘on the applicability of British law to Aborigines’, the court nevertheless sentenced Helia to death as a means of enforcing British law — the death sentence was commuted to life imprisonment in deference to his ‘acting in retaliation obligated by his own laws.’¹²⁷ There was much judicial debate on the question of *inter se* cases in Western Australia following *Helia*. George Grey, a magistrate from 1837 to 1839, argued that there was a fallacy in the belief that Aboriginal offenders should, in *inter se* matters, be allowed to commit criminal acts without recourse to British Law as he believed ‘Aborigines did not have a regular code of laws’ and that at the time of settlement, all persons were amenable to British law.¹²⁸ Hunter states that:

¹²² Note that Douglas and Finnane, above n 112, 14, use a date of 1833 whereas other sources mention a date of 1834; see eg, Sydney Morning Herald, ‘Pinjarra’ February 8 2004 <<http://www.smh.com.au/news/western-australia/pinjarra/2005/02/17/1108500208647.html>>; the site of the Battle of Pinjarra was located 80 kilometres south of the Swan River settlement.

¹²³ Ann Hunter, ‘The boundaries of colonial criminal law in relation to inter-Aboriginal conflict (*inter se* offences) in Western Australia in the 1830s-1840s’ (2004) 8(2) *Australian Journal of Legal History* 215, 221–23.

¹²⁴ *R v Gear* (1837, Western Australia Court of Quarter Sessions as reported by the Perth Gazette, 2 January 1837).

¹²⁵ *R v Helia* (1838) reported in the Perth Gazette 2 July 1838.

¹²⁶ Hunter, above n 123, 222–24.

¹²⁷ *Ibid* 223.

¹²⁸ *Ibid* 226–27.

Grey wanted Aborigines to be weaned from their own laws, and for them to be replaced by British law which he envisaged would provide protection against violence for all *inter se* ‘offences’ as well as meet the objects of policies on ‘civilisation’. In his view, under the present practice there were no benefits or protection under British law for Aborigines, only the effect of punishment.¹²⁹

Governor Hutt, however, held an opposing view. He believed that in *inter se* matters, British law ‘should only apply to those “which come under our cognizance” which “must be treated as breaches of the peace, and that even murder can only be visited with the penalty of banishment.”’¹³⁰ The debate on *inter se* amenability continued until *R v Wiwar*,¹³¹ a case involving an Aboriginal man charged with the murder of another.¹³² Wiwar was found guilty and sentenced to transportation for life.¹³³ In a newspaper report of this case, along with six other cases for larceny ‘[t]he Chairman [of the Grand Jury] ... directing their attention to the several cases which would be brought under their notice, and we are happy to find that the offences are *not that of a very grave or serious character*.’¹³⁴ Although an editorial comment, it can only be seen as being *laissez-faire*, no doubt reflective of public attitudes of the time towards *inter se* matters.

South Australia was established as Australia’s only convict-free settlement on 28 December 1836 under the statutory authority of the Imperial *South Australia Act 1837*.¹³⁵ Although Aboriginal people were deemed to be British subjects who were subject to and protected by British law,¹³⁶ the reality was somewhat different.

¹²⁹ Ibid 227.

¹³⁰ Ibid, citing Despatch Hutt to Glenelg 3 May 1839, *Papers Relative to the Aborigines, Australian Colonies*, British Parliamentary Papers (first published 1844, 1968) vol 8, 365. The Colonial Office supported Hutt’s policy regarding *inter se* conflict. J Stephen Memo, 26 Nov 1841, COL18/28, f 60, PRO.

¹³¹ *R v Wiwar* [1842] WA SupC 7 (3 January 1842).

¹³² Hunter, above n 123, 229–33; for an expansion on the *Wiwat* case see also Douglas and Finnane, above n 114, 41–50.

¹³³ Hunter, above n 123, 232.

¹³⁴ *R v Wiwar* [1842] WA SupC 7 (3 January 1842), as noted in the Perth Gazette and Western Australian Journal (WA: 1833–1847), Saturday 8 January 1842, 2–3 (emphasis added).
<<http://www.austlii.edu.au/au/cases/wa/WASupC/1842/7.html>>.

¹³⁵ *South Australia Act 1837* (UK) - An Act to empower His Majesty to erect South Australia into a British Province or Provinces, and to provide for the Colonization and Government thereof
<<http://www.foundingdocs.gov.au/item-sdid-37.html>>.

¹³⁶ *Letters Patent establishing the Province of South Australia 19 February 1836* (UK)
<http://www.foundingdocs.gov.au/resources/transcripts/sa2_doc_1836.pdf>.

South Australia's first Chief Justice, Charles Cooper, at least in the early years of the colony's settlement, had difficulty in accepting jurisdiction over Aboriginal people, particularly those who had minimal contact with settlers and British law.¹³⁷ This was exemplified in *R v Larry*,¹³⁸ an *inter se* case of 1846, involving an Aboriginal man, Larry, indicted in South Australia's Supreme Court for killing another Aboriginal, Ralloolooyoo (or Ronkurri).¹³⁹ The defence argued that Larry 'knew nothing of British laws and therefore owed no allegiance to them ... [and] could not be held to account for an apparent transgression against those laws.'¹⁴⁰ As described by Alan Pope, '[t]he case was complicated by the fact that no-one had yet managed to communicate effectively with 'Larry', including his lawyer.'¹⁴¹ Although disallowed by Cooper CJ because no plea had been taken, the defence argued that Larry 'might be punishable or might not by the laws of his own people', a matter of possible double jeopardy. The defence focused on questions of how British sovereignty was acquired by the Crown. 'This is not a conquered country, nor was there any law, by which we, coming into it, could, without the consent of the natives, try offences among them.'¹⁴² This question was not ruled on by the Court and despite attempting to enter a plea of not guilty, it was held that as Larry did not understand English and no competent interpreter was available, he was unable to provide instructions. The case was dismissed on 17 March 1847. Pope contends that Cooper held a view that:

Aboriginal people's lack of knowledge about British law and its operation manifested itself in various ways. For the courts, it was not just a matter of determining whether an Aboriginal person understood the primacy of British law but also whether he or she understood processes associated with and based on the common law of England, such as arrest. Without a reasonable period of prior contact with Europeans, could Aboriginal people be held legally accountable for actions which would otherwise clearly amount to resisting arrest?¹⁴³

¹³⁷ Pope, above n 119, 26–28.

¹³⁸ *R v Larry* [1847] SA SupC 39 (15 March 1847) <<http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/sa/SASupC/1847/39.html?stem=0&synonyms=0&query=title%28R%20and%20Larry%20%29>>.

¹³⁹ *Ibid.*

¹⁴⁰ For a more complete discussion on this case, see Pope, above n 119, 30.

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

¹⁴³ *Ibid.* 31.

Pope's contention serves to illustrate the difference between sovereignty and pluralism. Sovereignty in *Larry* was not challenged but the operation of the law within a territory was understood to remain variable, depending upon the degree of Aboriginal autonomy. Cooper's view was at loggerheads with the more pragmatic opinion of the colony, with many believing that no protection could be afforded to settlers if Aboriginal people were exempted from the law on the grounds of their lack of understanding of legal processes.¹⁴⁴ As discussed by Pope, Cooper's views were not, however, completely out of step with those of other jurists such as that of Willis J in *R v Bonjon* in 1841.¹⁴⁵ The debate over the amenability of Aboriginal people to the British law continued in South Australia, according to Pope, until 1861 with the murder of a white woman and her two children near Kapunda by local Aboriginal people where 'all but one had been born and raised after European settlement of the area.'¹⁴⁶

The examination of early *inter se* cases reveals several important points regarding colonial judicial debate on Aboriginal amenability to British law. Although full jurisdiction over all Aboriginal people appeared to be established in the 1836 case of *R v Murrell*,¹⁴⁷ questions of jurisdiction over *inter se* matters persisted in the colonies and are echoed in continuing debates about self-determination today. The early *inter se* cases of *Murrell* in New South Wales, *Helia* in Western Australia, and *Larry* in South Australia show that acquittals or dismissal on various grounds demonstrate the assertion of the courts' jurisdiction to hear such matters, but reveal a reluctance to apply death penalties. Finally, the assertion of sovereignty did not settle the matter of jurisdiction. In South Australia, Cooper CJ held that the court's jurisdiction only applied to Aboriginal people who had contact with colonial society, but this did not threaten his understanding of Crown sovereignty across the entire colony. Governor Hutt in Western Australia held a similar view, one that was not objected to by the Under-Secretary of the British Colonial Office, James Stephen.¹⁴⁸ Questions of jurisdiction over Māori *inter se* matters was also evident in New Zealand when it became a Crown

¹⁴⁴ Ibid.

¹⁴⁵ Ibid 27.

¹⁴⁶ Ibid 40.

¹⁴⁷ *R v Murrell and Bummaree* (1836) 1 Legge 72; [1836] NSW SupC 35 (Forbes CJ) (5 February 1836).

¹⁴⁸ See *Australian Dictionary of Biography*, Australian National University
< <http://adb.anu.edu.au/biography/stephen-sir-james-2694>>.

colony in 1840.¹⁴⁹ The early colonial *inter se* cases reveal that jurisdiction over Aboriginal peoples was a graduated process, being extended as they met colonial society. Aboriginal people were seen initially as being ‘beyond colonial jurisdiction.’¹⁵⁰ There was early recognition by colonial officials that the extension of jurisdiction had to catch up with the assertion of sovereignty.

B Post-Settlement Pluralism

While issues of sovereignty appear to have been legally settled early in the settlement phase of Australia, challenges continued into the latter part of the 20th century, evidenced by *Coe*¹⁵¹ and *Walker*.¹⁵² Issues of criminal jurisdiction over Indigenous people, in cases between Aboriginal peoples and non-Indigenous Australians and in *inter se* matters, have also been settled, but there are lingering questions over the applicability of traditional law and custom in the areas of criminal culpability, bail and sentencing where issues of an offender’s Aboriginality and customary law still prevail.¹⁵³

These issues are exemplified in a large number of cases across all Australian criminal jurisdictions. In the seminal 1976 Northern Territory case of *R v Anunga*,¹⁵⁴ Forster J developed guidelines to be adopted by police when interviewing Aboriginal suspects.¹⁵⁵ These guidelines resulted from concerns over the many cases where police records of interview with alleged Aboriginal offenders were ruled inadmissible due to the offenders’ poor understanding of English and cultural factors such as gratuitous concurrence. *Anunga* has been applied in a large number of subsequent criminal cases

¹⁴⁹ Unlike the colonisation of Australia, the Crown recognised the sovereignty over New Zealand by Māori until the Treaty of Waitangi in 1840, see McHugh, above n 8, 166–73, the jurisdiction of courts extended to Māori-Pākehā matters but not to Māori *inter se* matters; see also Shaunnah Dorsett, *Juridical Encounters: Maori and the Colonial Courts, 1840-1852* (Auckland University Press, 2017).

¹⁵⁰ McHugh, above n 8, 177.

¹⁵¹ *Coe v Commonwealth (No 2)* (1993) 68 ALJR 110.

¹⁵² *Walker v New South Wales* (1994) 182 CLR 45.

¹⁵³ For a full discussion on these aspects, see Douglas and Finnane, above n 114.

¹⁵⁴ *R v Anunga* (1976) 11 ALR 412.

¹⁵⁵ Generally referred to as the *Anunga Guidelines* or *Rules*.

throughout Australia, including for example, *Frank v Police*,¹⁵⁶ *R v Robinson*¹⁵⁷ and *Western Australia v Gibson*.¹⁵⁸

Customary law has also played a role in criminal cases where the offender has been at risk of receiving traditional punishment for the crime committed.¹⁵⁹ *R v Sydney Williams*¹⁶⁰ is a case on point, where Williams, a Pitjantjatjara man, as part of his sentence for manslaughter, ‘should be returned to his tribe and handed over to the elders.’¹⁶¹ However, as reported by Douglas and Finnane, this was a case where:

Underlying these concerns [about returning a man to his community for possible traditional punishment] was the tension implicit in accepting corporal punishment as a reflection of values of cultural difference and legal pluralism, on the one hand, and yet rejecting such punishments as unconscionable in a highly civilised society, on the other hand.¹⁶²

This tension will be examined further in chapter 6 of this thesis.

The relevance of a deprived Aboriginal background has also received judicial attention in the significant cases of *R v Fernando*¹⁶³ and *Bugmy v The Queen*.¹⁶⁴ In *Fernando*, the New South Wales Supreme Court articulated eight sentencing principles in recognition of an offender’s ‘Indigenous background, poverty and alcoholism’ in mitigation of sentencing.¹⁶⁵ The ‘Fernando sentencing principles’ include:

1. Facts relevant to the offenders’ membership of a group should be accounted for, but ‘the same sentencing principles are to be applied in every case’.
2. Aboriginality does not necessarily ‘mitigate punishment’ but may ‘throw light on the particular offence and the circumstances of the offender’.
3. Alcohol abuse and violence ‘go hand in hand within Aboriginal communities’, feeding into ‘grave social difficulties’ of unemployment, low education, stress, and so

¹⁵⁶ *Frank v Police (SA)* [2007] SASC 288.

¹⁵⁷ *R v Robinson* [2010] NTSC 09.

¹⁵⁸ *Western Australia v Gibson* (2014) WASC 240.

¹⁵⁹ See, eg, Douglas and Finnane, above n 114, 168–180.

¹⁶⁰ *R v Sydney Williams* (1976) 14 SASR 1.

¹⁶¹ *Ibid.*

¹⁶² Douglas and Finnane, above n 114 160.

¹⁶³ *R v Fernando* (1992) 76 A Crim R 58.

¹⁶⁴ *Bugmy v The Queen* [2013] HCA 37.

¹⁶⁵ Thalia Anthony, ‘Before the High Court: Indigenising Sentencing? *Bugmy v The Queen*’ (2013) 35 *Sydney Law Review* 451, 456.

on.

4. Mitigation should be provided where alcohol abuse reflects the offender's 'socio-economic circumstances and environment'.
5. Courts should provide punishment to protect Indigenous victims and reflect the seriousness of 'violence by drunken persons', particularly domestic violence.
6. A long prison term is particularly alienating and 'unduly harsh' for Indigenous people who come from a 'deprived background' or have 'little experience of European ways'.
7. The relationship between violence and alcohol abuse in Indigenous communities requires 'more subtle remedies' than imprisonment.
8. The public interest in 'rehabilitation of the offender and the avoidance of recidivism on his part' should be given full weight.¹⁶⁶

In 2013, the High Court in *Bugmy* held that social disadvantage does not diminish over time and that Aboriginal disadvantage is not unique when compared with other types of social disadvantage and should receive special treatment in the courts.¹⁶⁷ As stated by Lucy Jackson, '*Bugmy* does not address the role of Aboriginality *per se* in sentencing decisions ... [its] effect ... is that Aboriginal offenders will be able to rely upon evidence of systemic social deprivation as a relevant factor in the determination of an appropriate sentence on an individual basis.'¹⁶⁸

Both *Fernando* and *Bugmy* demonstrate a continuing judicial debate that while Aboriginality *per se* is not a mitigating factor, courts can consider matters relating to a person's background when sentencing. While not a recognition of Aboriginal traditional customs and law, of direct legal pluralism, there is, nevertheless, judicial recognition of the disadvantage suffered by many Aboriginal people who find themselves in conflict with the criminal law. When juxtaposed against the provisions of Aboriginal Sentencing Courts (Nunga Courts),¹⁶⁹ where circle sentencing, or restorative justice principles apply, there exists a dichotomy, one which does not threaten Australia's sovereignty. There is legislative recognition in circle sentencing processes

¹⁶⁶ Ibid, citing *R v Fernando* (1992) 76 A Crim R 58, 62–3.

¹⁶⁷ See generally, *Bugmy v The Queen* [2013] HCA 37 [44]–[49] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

¹⁶⁸ Lucy Jackson, 'Casenote: *Bugmy v R* (2013) 302 ALR 192' (2014) 8(10) *Indigenous Law Bulletin* 27, 29.

¹⁶⁹ *Criminal Law (Sentencing) Act 1988* (SA) s 9C.

of the differences between Aboriginal methods of resolving disputes and the Australian legal system, and will be discussed in more detail later in this thesis. When combined, the effect of case law and legislation as discussed offers the possibility for recognition of legal pluralism as a means for achieving a greater level of Indigenous self-determination in Australia.

V CONCLUSIONS

This chapter has highlighted the dichotomy that exists in questions of Aboriginal sovereignty and legal pluralism. Regarding sovereignty, on one hand the matter has been legally settled, yet on the other, challenges in the courts have continued. This is because of an important disjuncture between sovereignty and the operation of law. Similarly, with respect to legal pluralism in the criminal law arena, while full jurisdiction by the courts over matters involving Aboriginal people has been established, there still exists a soft form of legal pluralism.

This thesis will argue that criminal justice in the APY Lands requires a greater recognition of the existing cultural plurality in law. The thesis demonstrates the ways that this pluralisation of the law is possible, giving rise to an outcome of practical improvement on the current criminal justice system. Through the lenses of sovereignty and legal pluralism, and the relationship between them, the following chapters will discuss issues associated with the administration of justice in the APY Lands.

CHAPTER 3: THE APY LANDS IN CONTEXT

I INTRODUCTION

An examination of the contemporary administration of justice issues associated with the Anangu Pitjantjatjara Yankunytjatjara (APY) Lands would be incomplete without an historical and contemporary overview of this remote north-western region of South Australia. Part II of this chapter examines the extent to which traditional life and culture was, and is, practised by Pitjantjatjara and Yankunytjatjara people (Anangu) in the APY Lands. Community structures and sources of traditional authority are also explained. Differences between non-Aboriginal (or Western) culture and language and that of APY Anangu are significant and present challenges for those involved in the criminal justice system. Current socio-economic factors, including high Anangu unemployment rates and the reliance on social security benefits are also scrutinised.

Part III considers contemporary health and welfare dilemmas on the Lands, including those associated with life expectancy, suicide and self-harm, and hearing loss. Ongoing problems with violence and sexual assault, and the use of illicit drugs, alcohol and gambling are examined, revealing the criminal justice needs of APY communities. Part IV examines crime statistics regarding Anangu, revealing the extent to which later issues relate. The resolution of the matters raised in this chapter have proven difficult for authorities and, this thesis contends, are major contributing factors which lead to the criminal justice issues identified later in this thesis.

II APY LANDS — OVERVIEW

The geographical APY Lands, home to approximately 1905 Anangu, covers an area of 103 000 square kilometres in the remote north-western corner of SA.¹ The cultural APY Lands, known as the Ngaanyatjarra Pitjantjatjara Yankunytjatjara (NPY) Lands, include Anangu living in the contiguous areas of Western Australia and the Northern Territory. Collectively, Anangu from this area form part of the Western Desert

¹ W H Edwards, 'Patterns of Aboriginal Residence in the North-west of South Australia' (1992) 30 (December) *Journal of the Anthropological Society of South Australia* 2; see also Australian Bureau of Statistics, *2016 Community Profiles, APY Lands - Aboriginal and Torres Strait Islander Peoples Profile* <http://www.censusdata.abs.gov.au/census_services/getproduct/census/2016/communityprofile/406021138?opendocument>; Anangu – a Pitjantjatjara word meaning 'people or body', see Paul Eckert, *Pitjantjatjara / Yankunytjatjara Picture Dictionary* (IAD Press, 2007) 175.

Language group of Aboriginal peoples, with various dialects of this language group spoken by people occupying a vast territory of over one million square kilometres of SA, WA and the NT.²

A Traditional Lifestyle

Prior to the arrival of Europeans, NPY Anangu lived in the north-west of South Australia and adjacent areas of Western Australia and the Northern Territory, occupying country around the Petermann, Tomkinson, Mann and Musgrave Ranges, and further south-east to the Everard Ranges.³ Due to food and water limitations, they lived as small groups or bands of hunter/gatherer people, usually numbering between six and 20, coming together as necessary for cultural obligations, changing seasons and depletion of local resources.⁴ Group movement was also determined by:

the association which each group claimed to specific territories with which they claimed a totemic link. According to the *Tjukurpa* or Dreaming stories the features of each cluster of sites were viewed as the tracks or metamorphosed bodies of the Ancestral Spirits who had emerged from the earth during the Dreaming and moved across its surface. These beings were identified with the various species of the regions, including the humans, for example, as kangaroo-man, emu-man, echidna woman, bowerbird-woman, native fig-man, etc.⁵

Primary rights and obligations were held by individual members of a group towards ‘sites, stories, rituals and resources of the area’,⁶ forming a traditional basis of the Homelands movement in the Lands as practiced today.⁷ Each major group speaks its own dialect of the Western Desert Language and despite the contrary belief of many today, NPY Anangu are able to converse easily with each other using their own dialects — it is only those groups who are more widely separated geographically who may experience difficulties.⁸

² Michael Walsh and Colin Yallop, *Language and Culture in Aboriginal Australia* (Aboriginal Studies Press, 2012) 1 — the languages spoken by each group are Ngaanyatjarra, Pitjantjatjara and Yankunytjatjara.

³ Edwards, above n 1, 3.

⁴ Ibid.

⁵ Ibid 5.

⁶ Ibid.

⁷ Smaller ‘homeland communities’ such as Kanpi and Waturra, are examples where small family groups have established themselves away from the larger Lands’ communities.

⁸ Walsh and Yallop, above n 2.

B *Traditional Culture and Law*

Traditional culture and law is pivotal to the lives of Aboriginal people in the APY Lands. As noted, despite the dynamic nature of NPY traditional culture, it is under attack on several fronts as will be seen in this chapter. Issues raised include questions regarding the complexities in the maintenance and custodianship of culture and the difficulties of applying appropriate criminal justice programs for people in the APY Lands. What makes these questions difficult to address is that unlike non-Indigenous law, Aboriginal traditions, culture and law are not in a written form.⁹ However, an understanding of the complex nature of NPY culture and languages assists in understanding the difficulties faced by police when interviewing alleged Aboriginal offenders, often to the detriment of Anangu.¹⁰

Traditional law (*Tjukurpa* — the Dreaming in Pitjantjatjara) is something of a misnomer as it tends to imply Western concepts of a fixed set of laws or rules that a particular group of traditionally-oriented Aboriginal people adhere to — but this is far from reality. Kathryn Trees, in her discussion on customary law, observes:

Both the use of English and needing to speak to people outside their language groups has required Aboriginal people to use such terms (or variations of them). ‘Law’ and ‘customary law’ are inadequate because they cannot be free of the western concepts and power ascribed to the word ‘law’ and the status of law as somehow above or separate from other aspects of our daily lives.¹¹

Scott Cane comments that for the Spinifex people of the Great Victoria Desert region of Western Australia, ‘Tjukurrpa’:

⁹ Written forms of Aboriginal languages did not appear until after British settlement.

¹⁰ *R v Anunga* (1976) 11 ALR 412 — the ‘Anunga Guidelines’.

¹¹ Kathryn Trees, ‘Contemporary issues facing customary law and the general legal system: Roebourne - a case study’ (Background paper No 6, Law Reform Commission of Western Australia, January 2006). 218 <www.lrc.justice.wa.gov.au/_files/P94_Background_Papers.pdf>; see also generally W H Edwards, *An Introduction to Aboriginal Societies* (Social Science Press, 2nd ed, 2004); note that ‘dreaming’ is more commonly used than ‘dreamtime’.

[p]rovides an explanation of nature, establishes a social code, creates a basis for prestige and political status within the community, acts as a religious philosophy and forms a psychological basis (if not psychological controls) for life.¹²

Bill Edwards points out that exchange or reciprocity, *ngapartji ngapartji* (in turn, in turn) was '[c]entral to the social, economic and ritual life of the Anangu ...' and:

In their earlier contacts with pastoralists and missionaries they were able to establish some degree of reciprocity in their relationships by giving their labour or exchanging dingo scalps in return for the new foods and other commodities they wanted ... [but] despite the rhetoric of self-management and self-determination, [they] appear to be more dependent now than they were under mission administration.¹³

For Anangu, *Tjukurpa* remains an essential part of their everyday lives including, but not limited to birth, initiation, marriage, death, spirituality and connectedness to the land, and to social interactions and expectations.¹⁴ The latter includes avoidance relationships, the division of labour and to dispute management including sanctions and punishments.¹⁵

1 *The Importance of 'Self'*

Individual names are of particular importance in traditional Anangu culture. In Pitjantjatjara, when asking a person their name, one would ask '*Nyuntu ini ngananya?*' (You name who?), rather than '*Nyaa nyuntumpa ini?*' (What is your name? — *nyuntumpa* is the possessive form of you). The difference is subtle, but it reflects the fact that Anangu see their name as being part of their cultural individuality, rather than a possession.¹⁶ The importance of self, and of the relevance of avoidance relationships, is illustrated by Coroner Wayne Chivell:

In traditional Aboriginal culture, it is customary to avoid using the first name of the deceased during the period of mourning which, unfortunately, has been prolonged by

¹² Scott Cane, *Pila Nuru: The Spinifex People* (Freemantle Arts Centre Press, 2002) 82; the Spinifex people, like Pitjantjatjara and Yankunytjatjara Anangu, are part of the Western Desert dialect group of Aboriginal peoples.

¹³ Bill Edwards, 'A Personal Journey with Anangu History and Politics' (2011) 27 *The Flinders Journal of History and Politics* 13.

¹⁴ See Edwards, above n 11, 18; see also Maggie Brady, 'Dealing with disorder: Strategies of accommodation among the southern Pitjantjatjara, Australia' (Master of Arts Thesis, Australian National University, 1987).

¹⁵ Edwards, above n 11, 72-6.

¹⁶ Ibid 123.

the necessity to conduct these Inquests. Instead of the first name, the word ‘Kunmanara’ is used. In Pitjantjatjara, this means ‘no name’.¹⁷

The use of *Kunmanara* can continue for several months or longer depending on the traditional grieving process, which is also related to the cultural standing of the deceased within an APY community. Even when a period of mourning is completed, the affected person is often given a different first name causing later identification problems for both police and courts.

2 Cultural Relativism

From an anthropological perspective, the concept of cultural relativism is grounded in the belief that a person’s philosophies, traditions, morals and customs should be viewed in the context of their culture. Noted anthropologist and linguist, Peter Sutton, argues that while narrow political, economic and social pressures have enlivened ‘strong relativism’ as an ideology in the collective conscience, it is undeniable that these forces have yielded some highly problematic contradictions. The application of ‘law’ to matters of cultural relativism within the Australian landscape has been affected by societal change, including a broader demographic, which has frayed the ‘strong relativism’ that informed liberal progressive opinion some thirty years ago.¹⁸

In one of a collection of responses to Sutton’s argument regarding cultural relativism and the recognition of Aboriginal customary law in Australia, Diane Austin-Broos broadly agrees with his two major observations. From expressing consensus that ‘relativism’ has weakened and thus become less appropriate than it once was — both in legal practice and in geographical terms — Austin-Broos adds that an ‘ideology’ sympathetic to ‘relativism’ may be sustained within facets of Australian society in order to meet particular ends. She cites ‘indigenous enclave politics and non-indigenous self-redemptive feel-goodism’ as two ends of the spectrum.¹⁹ Austin-Broos concludes her

¹⁷ Wayne Chivell, ‘Inquest into the deaths of Kunmanara Ward, Kunmanara Ken, Kunmanara Ryan and Kunmanara Cooper - Finding of the State Coroner’ (2005) 1 [1.2] — note that *Kunmanara* is used by both males and females.

¹⁸ Peter Sutton, ‘Customs not in common: cultural relativism and customary law recognition in Australia’ (2006) 6 (March) *Macquarie Law Journal* 161, 174; see also Diane Austin-Broos et al, ‘Responses to Peter Sutton’ (2006) 6 (March) *Macquarie Law Journal* 177, 177.

¹⁹ Austin-Broos et al, above n 18, 177.

response by quoting the philosopher Bernard Williams who observed ‘in today’s world “a fully individual culture is at best a rare thing”’.²⁰ She further comments that:

Fictions of bounded incommensurable [cultural] wholes can be used in politics and in the law to simplify matters or, sometimes, to protect a weaker party in relation to a stronger one. However, as the weaker one will invariably tend to change in the direction of the stronger one, these fictions can bring adverse results as well as positive ones.²¹

In another response to Sutton’s article, Archana Parashar writes:

The state legal system assumes that it remains the only source of value use of force and it, in its magnanimity, has decided to allow some customary rules to operate. But by the very nature of this grant of largesse, it is susceptible to be withdrawn anytime. This is not cultural relativism but cultural imperialism continuing as ever before.²²

The relevance of these comments will become clearer in the following discussion on traditional punishment, particularly those ‘sanctioned’ by police in remote Aboriginal communities.

C *Traditional Sanctions/Punishments*

In traditional Aboriginal society, the ‘principle of talion’ was applied as revenge on an offender, or in their absence, to a relative.²³ The roles played by individual offenders and victims, the emphasis of most European law, does not figure as strongly in traditional law, where the focus is on the relationships between kin networks in order to restore social equilibrium.²⁴ Traditional sanctions and punishments, as outlined by Trees, can vary and includes:

- death (either directly inflicted or by ‘sorcery’ or incantation), spearing (of greater or less severity) or other forms of corporal punishment;
- individual or collective ‘duelling’ with spear, boomerang or fighting sticks;
- shaming or public ridicule;

²⁰ Ibid 179, citing Bernard Williams, *Ethics and the Limits of Philosophy* (1985) 158.

²¹ Ibid.

²² Ibid 182.

²³ Talion meaning a basic ‘eye for an eye’ punishment — see Encyclopaedia Britannica online <<http://www.britannica.com/topic/talion>>.

²⁴ Peter Sutton, ‘Aboriginal customary law: what is it and what is it not?’ (Paper presented at the SA Law Society Seminar: Aboriginal Customary Law, Adelaide, 29 July 2006) 2.

- more rigorous forms of initiation or training;
- burning the hair from the wrongdoer's body;
- certain arrangements for compensation (eg, through adoption or promised marriage);
- exclusion from the community (eg, to a particular outstation or community, or more rarely, total exclusion).²⁵

Although written by Trees about Aboriginal people of the Roebourne region of Western Australia, similar traditional sanctions and punishments were practised by APY Anangu.²⁶

Incidents of 'indigenous regulated revenge' or 'payback',²⁷ where public leg-spearing has been carried out by Aboriginal people during the 1900s and 2000s, have sometimes been witnessed by members of the Northern Territory Police as a means of legitimisation.²⁸ Having witnessed payback spearing on two occasions in the late 1970s and once in the mid-1980s, I am also aware of similar activities in the APY Lands. My requested attendance on each occasion was a matter of considerable concern, conflicting with my personal beliefs and abhorrence of violence, and my peace-keeping role as a police officer. At the time, South Australia Police (SAPOL) had an unofficial policy of tolerating these incidents, and no criminal charges resulted.

I was also aware that sometimes payback continued for several months, where the original law breaker was speared in the thigh and a relative of that person carried out payback on the original spearer, which in turn led to other relatives reciprocating in an equally violent manner. This cycle of violence appeared to cease only when all parties were somehow satisfied that traditional justice had been served.²⁹ There are cases, unfortunately, where traditional payback resulted in death, posing a very real dilemma

²⁵ Trees, above n 11, 222; see also R W Byard, J D Gilbert and R A James, 'Traditional Punishment and Unexpected Death in Central Australia' (2001) 22(1) (March) *The American Journal of Forensic Medicine and Pathology* 92, 94.

²⁶ See, eg, Edwards, above n 11, 72–6.

²⁷ Known in Pitjantjatjara as '*ngapartji ngapartji*' — reciprocity or 'what goes around, comes around'.

²⁸ Sutton, above n 18, 161.

²⁹ My personal experience; see also Austin-Broos et al, above n 18, 177–8.

for the Australian legal system.³⁰ It also raises the important questions of whether such violence, despite being labelled ‘traditional’, can be tolerated in the 21st century, and one of double jeopardy where a person has been punished by traditional law and also by Australian law for the same offence. Although the legal system asserts its jurisdiction much more confidently today, the dilemmas of early the *inter se* cases of *R v Ballard*,³¹ *R v Murrell and Bummaree*,³² and *R v Bonjon*³³ remain, revealing the dilemma of whether the western legal system should become involved. Perhaps the question now is more about the extent of the relevance of killing being part of traditional law.

D Post-European Settlement

Despite the spread of European settlement to other parts of Australia, and South Australia in particular, people in the APY Lands remained isolated compared with most other Indigenous groups.³⁴ From the first recorded visits to the north-west of South Australia in 1873 by European explorers William Goss and Ernest Giles, to a survey expedition undertaken in the years 1888 to 1892 some 52 years after first settlement of the State, contact with settlers was infrequent.³⁵ Official reports had expressed concerns about further development of pastoral areas in the north-west and the extinction of Aboriginal people in this region.³⁶

In 1920, during a continuing protectionist era, Anangu were afforded further ‘protection’ when 56 721 square kilometres of the north-west region was proclaimed an

³⁰ See, eg, Byard, Gilbert and James, above n 25, 92; see also *R v Sydney Williams* (1976) 14 SASR 1, where the defendant was given a two-year suspended sentence for killing his wife who allegedly insulted him by mentioning tribal religious secrets which women are not supposed to know or speak of. One of the conditions of the suspended sentence required Williams return to his community to receive tribal punishment.

³¹ *R v Ballard or Barrett* [1829] NSWSupC 26; sub nom. *R v. Dirty Dick* (1828) NSW Sel Cas (Dowling) 2 (Forbes CJ, Dowling J) (13 June 1829) <http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1829/r_v_ballard_or_barrett/>.

³² *R v Murrell and Bummaree* (1836) 1 Legge 72; [1836] NSWSupC 35 (Forbes CJ) (5 February 1836) <http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1836/r_v_murrell_and_bummaree/>.

³³ *R v Bonjon* [1841] NSWSupC 92 (Willis J) (16 September 1841). <http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/port_phillip_district/1841/r_v_bonjon/>; see also chapter 2 of this thesis.

³⁴ John Summers, ‘The Future of Indigenous Policy on Remote Communities’ (Paper presented at the Australasian Political Studies Association Conference University of Adelaide, Adelaide, 29 September – 1 October 2004) 5–6.

³⁵ Edwards, above n 1, 6.

³⁶ Summers, above n 34, 5–6; see also Edwards, above n 1, 2.

Aboriginal Reserve.³⁷ The Western Australian Government gazetted a similar area of land adjacent to the north-west of South Australia as a Reserve in the same year, as did the Commonwealth Government in south-western Northern Territory in 1921.³⁸ The North West Aboriginal Reserve extended from just west of Ernabella to the Western Australian border, near Mount Davies. The Ernabella Mission, now Pukatja and originally a 500 square mile (1295 square kilometres) pastoral lease granted in 1933, was established by the Presbyterian Church in 1937. Following the 1950s discovery of nickel at Mt Davies (now Pipalyatjara and nearby Kalka), a mining exploration camp was established. A water bore, and food were available, resulting in some groups being attracted to that area on a semi-permanent basis.³⁹

Musgrave Park Station, now Amata, was established in 1961; Fregon (Kaltjiti), originally an outstation of Ernabella, opened the same year. The Aboriginal Community of Indulkana (Iwantja) was established in 1968 when 30 square kilometres was excised from the nearby Granite Downs Station pastoral lease (which is now part of the APY Lands) and proclaimed part of the Reserve.⁴⁰ Mimili, previously the pastoral lease of Everard Park Station, was established in the 1960s.

As the area became more settled by Anangu, outstations (or homelands) were established in the 1970s and included, for example, Cave Hill, Kunamata, Lake Wilson and Ilturnga. Other family groups were soon established at Kuntjjanu, Wartarru (south-east of Pipalyatjara), with Kanpi, Nyapari and Angatja (between Amata and Pipalyatjara) being established a little later.⁴¹ Kenmore Park (east of Ernabella), formerly a cattle station and now called Yunyarinyi, was also established at this time.

E *Inalienable Freehold Title*

Following a protracted struggle, the Pitjantjatjara Council was established in 1976, leading to the passing of the *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA) (APY Land Rights Act), providing for ‘103,000 square kilometres of land to be held under inalienable freehold title by an incorporation made up of all traditional

³⁷ The North West Aboriginal Reserve — see, eg, Edwards, above n 1, 7; see also *Aborigines Act 1911* (SA) s 14 — the statutory authority for proclaiming areas of Crown Land as a reserve for Aborigines.

³⁸ Summers, above n 34, 7.

³⁹ Edwards, above n 1, 10.

⁴⁰ Ibid 15.

⁴¹ Ibid 22–23.

owners of the lands.⁴² This land extends west from the Stuart Highway to the Western Australian border, the north-west of South Australia, representing 10 per cent of the total area of the state.

Despite the post-World War II doctrine of assimilation,⁴³ and the subsequent eras of self-determination and reconciliation for all Aboriginal people, earlier protectionist views still prevail in the north-west of South Australia.⁴⁴ Permits for non-Aboriginal visitors to the area have been a requirement since the 1940s,⁴⁵ and continues for all non-Anangu⁴⁶ visitors to the APY Lands.⁴⁷

The permit system was subject to a major legal challenge under Commonwealth anti-discrimination legislation in 1985.⁴⁸ In *Gerhardy v Brown*,⁴⁹ the High Court held the system to be a ‘special measure’ under s 8 of that legislation.⁵⁰ Brennan J stated:

its purpose [the APY Land Rights Act] appears to be the restoration to the Pitjantjatjaras of the use and management of the lands free from disturbance by others so that they may foster the traditional affiliations that Pitjantjatjaras have with the lands and discharge the traditional responsibilities to which they are subject in respect of the lands.⁵¹

Brown, the respondent in *Gerhardy*, was a non-Anangu Aboriginal man who entered the APY Lands without a permit and was charged by Senior Sergeant Gerhardy (then officer in charge of the Oodnadatta Police Station and the police complainant in the originating action)⁵² under s 19 of the APY Land Rights Act.

⁴² Phillip Toyne and Daniel Vachon, *Growing Up the Country: The Pitjantjatjara struggle for their land* (McPhee Gribble/Penguin, 1984) 108; the incorporated body in which inalienable freehold title is vested is referred to under the *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA) s 5, as the ‘Anangu Pitjantjatjara Yankunytjatjara’.

⁴³ Summers, above n 34, 10.

⁴⁴ See further discussion in chapter 6 of this thesis.

⁴⁵ See Summers, above n 34, 5–7 — A requirement of the gazetted North West Reserve.

⁴⁶ *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA) s 4 (1) (Interpretation) — ‘Anangu’ means a person who is (a) a member of the Pitjantjatjara, Yankunytjatjara or Ngaanyatjarra people; and (b) a traditional owner of the lands, or a part of them.

⁴⁷ *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA) s 19.

⁴⁸ *Racial Discrimination Act 1975* (Cth).

⁴⁹ 1985 159 CLR 70.

⁵⁰ *Gerhardy v Brown* (1985) 159 CLR 70; see also Heather McRae et al, *Indigenous Legal Issues, Commentary and Materials* (Lawbook, 4th ed, 2009) 261 [5.500].

⁵¹ *Gerhardy v Brown* 1985 159 CLR 70, 136 (Brennan J).

⁵² Senior Sergeant Gerhardy was my senior officer when I was stationed at Oodnadatta during the late 1970s.

The APY Lands were, until relatively recently, an area of comparatively little commercial interest to pastoralists and miners because of limited water, lack of contemporary infrastructure and the vast distances from major railway and road networks. Given this remoteness, combined with relatively low exposure to non-Indigenous people, the powerful legislative protection of the Lands under the APY Land Rights Act, and the dogged retention of cultural practices and language by the Anangu, an argument could be raised that the South Australian colonial frontier ended at the eastern boundary of the APY Lands.

This thesis contends that the problems involving the application of the criminal law as it is administered in the APY Lands — and identified within the first 25 years of South Australia's settlement by Alan Pope⁵³ in southern SA — necessitate discussion and analysis of issues which still exist today in one form or another. These issues include amenability and jurisdiction; language problems, including concepts of gratuitous concurrence; and *inter se* jurisdiction.⁵⁴

F APY Lands — Demographics

Australian Bureau of Statistics (ABS) figures for 2012 reveal a total APY Lands population of 2807 people; 86.3 per cent, or 2422 people, identify as Aboriginal;⁵⁵ 82 per cent of all people (2301 people) in the Lands speak a language other than English at home. As only 2.6 per cent, or 73 people, were born overseas,⁵⁶ it can be assumed that the major spoken languages are Ngaanyatjarra, Pitjantjatjara or Yankunytjatjara. Interviews with Anangu community members in 2016 are consistent with this assumption — see Figure 3.1.

⁵³ Alan Pope, *One law for all? Aboriginal people and criminal law in early South Australia* (Aboriginal Studies Press, 2011).

⁵⁴ See further discussion in chapters 5 and 6 of this thesis.

⁵⁵ Australian Bureau of Statistics (ABS) Internet page (2011 Census): http://stat.abs.gov.au/itt/r.jsp?RegionSummary®ion=406021138&dataset=ABS_NRP9_ASGS&geocconcept=REGION&datasetASGS=ABS_NRP9_ASGS&datasetLGA=ABS_NRP9_LGA®ionLGA=REGION®ionASGS=REGION; the figures for Aboriginal people are from the 2011 Census.

⁵⁶ Ibid.

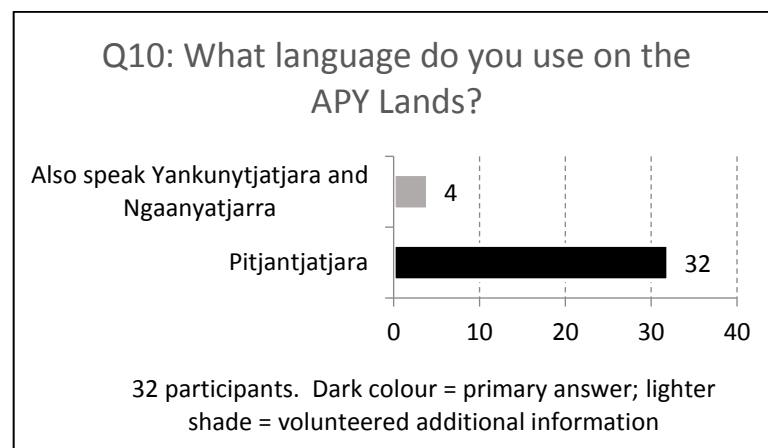


Figure 3.1 — APY Lands languages spoken 2016⁵⁷

In my own judgment, of the 32 Anangu who participated in interviews in 2016, 19 had difficulty understanding English, 12 understood most English words, and one spoke English fluently. The median age of Lands' residents is 26.7 years compared with the Australia-wide median of 37.3 years — the age of people in the APY Lands is reflected in the following table:

Age group	% of APY Lands population	All persons in APY Lands	Aboriginal persons in APY Lands ⁵⁸
0 to 14 years	24.7	665	574
15 to 24 years	20.5	552	476
25 to 34 years	20.6	555	479
35 to 44 years	13.3	358	309
45 to 54 years	9.3	250	216
55 to 64 years	6.7	180	155
65 + years	4.8	129	112
Totals:	99.9	2689	2321

Figure 3.2 — APY Lands population by age group.⁵⁹

⁵⁷ Although only 32 Anangu were interviewed, this figure represents 1.4 per cent of the Anangu population of the area.

⁵⁸ This figure was calculated at 86.3 per cent of totals.

⁵⁹ ABS, above n 55.

Population totals for each of the major APY communities consists of:

APY Lands Community	All residents
Indulkana (Iwantja)	200 to 250
Mimili	250 to 300
Fregon (Kaltjiti)	350
Umuwa	50 to 100
Ernabella (Pukatja)	600 to 700
Kenmore Park (Yunyarinyi)	40 to 45
Amata	270 ⁶⁰
Nyapari	50 to 100
Kanpi	50 to 100
Pipalyatjara	114 ⁶¹
Kalka	150 to 200
Watarru	62 ⁶²
Total:	2182 to 2617

Figure 3.3 — Population by APY Lands Community⁶³

Anangu are a highly mobile people, often travelling widely across NPY Lands communities for traditional events (including *inma*,⁶⁴ funerals and other cultural matters), and sporting events, explaining the variable population in Figure 3.3. Travel to Alice Springs, Coober Pedy, Port Augusta, and further afield is also common.

⁶⁰ Taylor Burrell Barnett Town Planning and Design, 'Watarru Community Structure Plan No. 1 (January 2007)' 7.

⁶¹ Taylor Burrell Barnett Town Planning and Design, 'Amata Community Structure Plan No. 1 (January 2007)' 7.

⁶² Ibid.

⁶³ Unless footnoted otherwise, most of the community population figures have been extracted from the Anangu Pitjantjatjara Yankunytjatjara Communities Internet site <<http://www.anangu.com.au/sa-communities.html>>.

⁶⁴ A Pitjantjatjara word meaning traditional or sacred ceremonies; see also Eckert, above n 1, 164.

The APY Lands are inalienable freehold title administered by a body corporate called *Anangu Pitjantjatjara Yankunytjatjara*.⁶⁵ The Lands cannot be compulsorily acquired, resumed or forfeited under the laws of South Australia.⁶⁶ The non-Indigenous population of approximately 369 people consists mainly of administrative staff and their families.⁶⁷ The number varies considerably with visitors, infrastructure maintenance contractors, court staff, visiting lawyers, fly-in, fly out (FIFO) health workers and police.

G *Employment*

The major employment opportunities available to *Anangu* within the Lands are in agriculture, education and training, health care and social assistance.⁶⁸ Many of the retail positions are held by non-Aboriginal people, often family members of administrative staff. ABS data reveal that only 444 persons were employed as wage-earners on the Lands in 2011, but the statistics do not differentiate between Indigenous and non-Indigenous people.⁶⁹ Needless to say, employment opportunities are scarce for *Anangu*, given that the majority of those employed are non-Indigenous.⁷⁰

H *Other Sources of Income*

A brief discussion regarding income sources, other than employment, helps to paint a socio-economic picture of the Lands population. The Community Development Employment Projects (CDEP) scheme, a work for the dole program, was first introduced to the APY Lands in 1977. Jordan explains that ‘[t]he original aim ... [was] to reduce the potential for long-term welfare dependence in remote Aboriginal communities where the recent introduction of unemployment benefits coincided with a lack of local jobs.’⁷¹ Jordan further states that despite the original focus of the CDEP being on creating jobs in remote communities, over time this was ‘significantly

⁶⁵ *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA) pt 2, div 1.

⁶⁶ *Ibid* s 17(a) and (b).

⁶⁷ ABS, above n 55 — 13.7 per cent of the total population of the Lands.

⁶⁸ *Ibid*; employment as health care workers are with Nganampa Health Services, responsible for community health clinics <<http://www.nganampahealth.com.au/>>.

⁶⁹ *Ibid*.

⁷⁰ *Ibid*; given that 13.7% (369) of the APY Lands population is non-Indigenous; note also that most stores in the Lands are managed and staffed by non-Indigenous people.

⁷¹ K Jordan, ‘Work, Welfare and CDEP on the Anangu Pitjantjatjara Yankunytjatjara Lands: First Stage Assessment’ (Centre for Aboriginal Economic Policy Research, October 2011) v [3] <<http://caepr.anu.edu.au/Publications/WP/2011WP78.php>>.

redefined by successive governments, moving them away from direct job creation and towards the placement of participants into non-CDEP jobs.⁷²

Until 2013, CDEP was successfully administered in the Lands by the Port Augusta-based Bungala Aboriginal Corporations but in that year the scheme was changed to the Remote Jobs and Communities Program (RJCP).⁷³ The RJCP includes a multifaceted approach involving various services including Disability Employment, Indigenous Employment, a variety of Job Service Providers (many being FIFO operators), and the provision of Centrelink availability at major Lands' communities.⁷⁴ Jordan reports that changes to the CDEP in 2009 'appear to be creating a disincentive for Anangu to participate in productive work and develop their capacities for non-CDEP employment ... encouraging a return to passive welfare.'⁷⁵ Jordan further states that 'without additional intervention, there is a risk that the scheduled removal of CDEP wages will further exacerbate this trend and add to, rather than ameliorate, the multiple disadvantages experienced by many Anangu on the APY Lands.'⁷⁶

However, Anangu returned to a CDEP variant of 'work for the dole' program under the RJCP from 1 July 2015, called the 'Community Development Programme (CDP)'.⁷⁷ Under the CDP, 'job seekers with activity requirements are expected to do up to 25 hours per week of work-like activities that benefit their community.'⁷⁸ Given the scarcity of employment opportunities presently available in the APY Lands this new requirement may prove problematic. Regardless of the term used, be it 'the dole', 'Newstart', 'CDEP', 'RJCP' or 'CDP', the majority of Anangu receive Centrelink benefits of one form or another,⁷⁹ to a point where there is generally a welfare

⁷² Ibid v [4].

⁷³ See Bungala Aboriginal Corporation <<http://www.bungala.com.au/>>.

⁷⁴ Information supplied by Bungala; see also Department of the Prime Minister and Cabinet, *Remote Jobs and Communities Program (RJCP)* <<https://www.dpmc.gov.au/indigenous-affairs/about/jobs-land-and-economy-programme/remote-jobs-and-communities-programme-rjcp>>.

⁷⁵ Jordan, above n 71, ix [20].

⁷⁶ Ibid.

⁷⁷ See generally Australian Government, Department of the Prime Minister and Cabinet, 'The Community Development Programme' <<https://www.pmc.gov.au/indigenous-affairs/employment/community-development-programme-cdp>>.

⁷⁸ Ibid; see also The Anangu Lands Paper Tracker, *Changes to Remote Jobs and Communities Programme* <<http://www.papertracker.com.au/2015/04/changes-to-remote-jobs-and-communities-programme/>>.

⁷⁹ See Centrelink Internet site <<http://www.humanservices.gov.au/customer/services/centrelink/>>.

dependency and an ‘expectation of reward with little or no effort’.⁸⁰ Anangu refer to welfare payments as ‘sit down money’.⁸¹

I Self-Determination

The question of self-determination for the APY Lands people is a difficult one. John Summers suggests that it has ‘never been spelt out’, where ‘[n]either the practical implications of the policy, nor the principles on which it is based are clear.’ He further states:

Self-determination has sometimes been advanced as an end in itself, and sometimes as a means to an end. Some interpretations of the policy appear to be directed at recognition of cultural difference and the ongoing maintenance of a separate Indigenous group identity. Other interpretations have appeared to be directed at Indigenous people making their own decisions or managing their own affairs as a means of overcoming social and economic disadvantage in the broader community.⁸²

Moreover, self-determination as applied to the APY Lands was, as Summers suggests, ‘ambiguous’, with some seeing:

Anangu as a people with a common interest which was centred on the ownership and control of the land but whose culture and interests would continue to adapt ... [and] would, in their own way, continue to adapt and to engage with the broader Australian political system and become more closely integrated into the mainstream society and economy.⁸³

Other views, Summers writes, are more ‘separatist’, in that ‘the two cultures [Indigenous and non-Indigenous] would always be distinct and separate’.⁸⁴ Although there was some optimism with the passage of the APY Land Rights Act in 1981, the problems associated with welfare dependency and reward for little effort, not to mention allegations of APY Board mismanagement,⁸⁵ has failed to realise practical self-determination for the APY Lands people.

⁸⁰ Anna Bulman and Emily Sims, ‘The fight for justice in remote indigenous communities’ (2013) 34(7) (August) *The Bulletin: The Law Society of South Australia* 24.

⁸¹ Jordan, above n 71, viii.

⁸² Summers, above n 34, 24.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ See, eg, Andrew Dowdell, ‘Sally Scales is new deputy chairwoman of troubled APY Lands executive board’, *Sunday Mail (SA)* (Adelaide), 2017 <<http://www.adelaidenow.com.au/news/south-australia/sally->

J Challenges and Strengths

With the development of communities on the APY Lands have come many government services in the form of schools, health clinics, welfare and other agencies, including police. Since the APY Lands were legislatively formed under the APY Land Rights Act, ‘the local community councils are required to negotiate with a plethora of bureaucracies’, and with the advent of social security payments, which has had a negative effect on the desire for employment, have combined to increase dependency on others.⁸⁶ Add to this socio-political mix the problems of petrol sniffing, alcohol (despite the Lands being ‘dry’), illicit drugs, gambling and the limited availability of employment, there is little incentive for formal education. Bill Edwards commented that ‘[s]ocial problems will increase unless serious, informed and resourced attention is given to the demographic, ecological and economic structure of the communities.’⁸⁷ Although made in 1992, this observation holds true today as reported by Summers, ‘most government programs are short term projects and are the responsibility of two or more agencies from several jurisdictions’, and involving more than one community, making it impossible to identify responsible agencies, ‘adding another layer to the labyrinthine structures.’⁸⁸ Problems also apply to the employment and high turnover rate of non-Indigenous people within the Lands, with many lacking corporate knowledge, as illustrated in the 2003 Strategic Plan commissioned by the Pitjantjatjara Yankunytjatjara Land Council (PYLC):

There are a number of reasons for staff turnover that include:

1. The political turmoil that has existed with the PYLC relationship with Government, ATSIC, PY [Pitjantjatjara Yankunytjatjara] organisations, Communities and Homelands;
2. Trying to manage limited resources when the social needs are huge;
3. The enormous pressure placed on staff to bridge the cultural divide between Anangu obligations to abide to cultural laws and western management policies;

scales-is-new-deputy-chairwoman-of-troubled-apy-lands-executive-board/news-story/779ecbceaedb784fc0622a2cf09a2807>; see also ABC News Update, ‘APY Lands funding to be withheld by Federal Government amid governance concern’, *ABC News Online* 27 April 2015 <<http://www.abc.net.au/news/2015-04-27/apy-lands-funding-withheld-federal-government/6424778>>.

⁸⁶ Jordan, above n 71, ix [20].

⁸⁷ Edwards, above n 1, 31.

⁸⁸ Summers, above n 34, 20.

4. The enormous pressure placed on staff to implement western management policies when Anangu face fourth world living standards; and
5. Working and living in a remote region of Australia.⁸⁹

This report, although 14 years old, still reflects the present-day position on the Lands.

The 2017 APY Board Chairman, Bernard Singer, was the subject of long-running disputes over alleged Lands mismanagement and poor governance. He has strenuously denied these allegations and was re-elected after standing down earlier in 2015.⁹⁰ Although further discussion is beyond the scope of this thesis, such issues serve to illustrate problems associated with internal Anangu management of the Lands.⁹¹

There are ongoing reports of political and financial turmoil in the Lands. An ABC television 7.30 Report investigated alleged financial mismanagement by two SAPOL officers in 2015. Both were former APY Lands officers with one member, obviously on extended leave, involved in the Land's cattle management program and operating an allegedly 'secret, private herd [of cattle] for personal gain, established without the knowledge of, or approval from, the APY executive'.⁹²

Despite these many challenges, Anangu have retained much of their traditional culture and particularly so with the maintenance of language (including a complex system of sign language),⁹³ *Tjukurpa* practices, and a host of other traditions, something other Aboriginal groups in South Australia have struggled with over many years.⁹⁴ Culture adapts to present-day conditions. Walsh and Yallop contend that unless a culture is dynamic and moves with the times it is destined to obscurity:

⁸⁹ Gongon Consultancy, 'Pitjantjatjara Yankunytjatjara Land Council Strategic Plan 2003' (Gongon Consultancy, April 2003) [5.6] <http://www.anangu.com.au/documents/cat_view/35-reports-about-the-apy-lands.html>.

⁹⁰ Natalie Whiting, 'Former APY Lands executive board chairman Bernard Singer re-elected in remote Aboriginal community elections', *ABC (online) 'The World Today'* 31 May 2015 <<http://www.abc.net.au/news/2015-05-25/former-apy-lands-chairman-bernard-singer-re-elected/6495640>>.

⁹¹ See, eg, Summers, above n 34, 4–5.

⁹² Alex Mann, 'Police officers dragged into scandal at Anangu Pitjantjatjara Yankunytjatjara Lands' (23 June 2015) *ABC Television: 7.30 (online)* <<http://www.abc.net.au/news/2015-06-23/police-officers-dragged-into-financial-scandal-at-apy-lands/6565156>>.

⁹³ Edwards, above n 11, 94–95.

⁹⁴ See Walsh and Yallop, above n 2, 2 — 160 Aboriginal languages are extinct throughout Australia.

This can't mean 'freezing' the culture or language at some point in time, whether at the time of first European contact or at the present. As a culture or language stops keeping up with the changes in daily life it becomes increasingly less useful and less likely to survive. To 'maintain' a culture or language it seems that you often have to let it change or even help it change.⁹⁵

Examples of NPY people moving with the times, include the inclusion of many English words in their language — *rapita* (rabbit), *raipula* (rifle), *titja* (teacher), *tjitja* (nursing sister) to mention but a few, words that were non-existent before the arrival of Europeans, but now form part of every-day speech.⁹⁶

III HEALTH AND WELFARE DILEMMAS

Despite the dynamic nature of the APY culture, health and welfare problems unknown before European settlement are proving difficult issues for Anangu to deal with. The issues discussed in the following sections reveal broader statistics relating to Aboriginal disadvantages, many of which, this thesis contends, are causal factors regarding high rates of often-adverse Anangu interaction with the criminal justice system.

A Life Expectancy

In 2009, a Nganampa Health report indicated that on the APY Lands, life expectancy of Anangu men was 'about 20 years less than non-Aboriginal men and about 15 – 17 years less for women.'⁹⁷ Reasons included 'high rates of chronic illnesses; failure to thrive, heart attacks, strokes, diabetes, high blood pressure, kidney disease and failure and lung disease.'⁹⁸ These figures are much higher than those for other Aboriginal and Torres Strait Islander (ATSI) peoples. ABS data from 2010 reveal that Australia-wide, life expectancy for ATSI men to be '11.5 years less than for non-Indigenous men (67.2 years and 78.7 years respectively)', and for ATSI women, 'the difference is 9.7 years (72.9 for ATSI women and 82.6 years for non-Indigenous women).'⁹⁹ The ABS also reported that deaths for Indigenous people are concentrated more widely across all age

⁹⁵ Ibid 218.

⁹⁶ Ibid 217-18; see also Eckert, above n 1.

⁹⁷ See Alan O'Connor, *Indigenous enterprises and entrepreneurship in remote Anangu communities* (PhD Thesis, University of South Australia, 2013) 34.

⁹⁸ Ibid.

⁹⁹ Australian Bureau of Statistics, *1370.0 - Measures of Australia's Progress, 2010: Health* (15 September 2010)

<<http://www.abs.gov.au/ausstats/abs@.nsf/bb8db737e2af84b8ca2571780015701e/f1452ed1b3b2c77aca25779e001c4758!OpenDocument#>>.

groups compared with older age groups for non-Indigenous people. Indigenous death rates are higher for various forms of heart disease, alcoholic liver disease and cirrhosis of the liver, and from diabetes than non-Indigenous people.¹⁰⁰ Infant mortality was over three times higher.¹⁰¹ The data relating to external causes of death for Indigenous people are just as disturbing — 16 per cent of all Aboriginal deaths resulted from accidents and violence compared with only 5.9 per cent for non-Indigenous Australians.¹⁰²

B Suicide and Self-Harm

A 2014 report on suicides and hospitalised self-harm in Australia by Flinders University found that:

For the period from 2007–08 to 2010–11, suicide rates for Indigenous males and females were around twice as high as the corresponding rates for *Other Australian* males and females ... [in the same period] rates of hospitalised intentional self-harm for Indigenous males and females were around 2.5 times and 2 times as high as the rates for *other Australian* males and females respectively.¹⁰³

Between 2001 and 2010, the rates per 100 000 for suicide of Indigenous people in South Australia were:

- In the 25 to 29 age group, males were 90.8 and females 18.1, compared with 22.1 and 5.4 respectively for male and female non-Indigenous people; and
- For all ages, males were 33.0 and females 8.7, compared with 16.5 and 4.5 respectively for non-Indigenous males and females.¹⁰⁴

Factors affecting reasons why people suicide or self-harm include a family history of child abuse, alcohol and illicit substance abuse, personal crises and social

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² Ibid — based on ABS figures for 2008.

¹⁰³ Australian Institute of Health and Welfare, ‘Suicide and hospitalised self-harm in Australia: trends and analysis’ (Flinders University, 2014) vii — emphasis in original.

¹⁰⁴ South Australian Government, ‘South Australian Suicide Prevention Strategy 2012-2016: Every Life is Worth Living’ (2012) 12 [Table 2]
<<http://www.sahealth.sa.gov.au/wps/wcm/connect/public+content/sa+health+internet/resources/south+australian+suicide+prevention+strategy+2012-2016>>.

isolation/exclusion.¹⁰⁵ Of serious concern is the high number of suicides, attempted suicides and threats of self-harm by Anangu, illustrated in Figure 3.4:

Year	Suicides	Attempted suicide	Threaten self-harm
2005	4	40	7
2006	2	12	2
2007	1	13	10
2008	2	24	28
2009	0	2	25
2010	0	3	18
2011	2	3	28
2012	1	10	17
2013 ¹⁰⁶	0	2	12
Totals	12	109	147

Figure 3.4 — APY Lands self-harm statistics¹⁰⁷

These figures can be seen as being representative of the powerlessness and dispossession felt by people in the Lands. The Mullighan Commission of Inquiry into child sex abuse on the Lands (Mullighan Report) expressed concern, linking sexual abuse of children with the number of suicides and attempted suicides by children on the Lands.¹⁰⁸ The data in Figure 3.4 indicate the need for all involved in the administration of justice to be conscious about Anangu who may be adversely affected by their involvement with the criminal justice system.

C Hearing Loss

A six-year study, concluded in 2012, found that ‘74% of children tested in the APY Lands fail a hearing screening test ... consistent with findings about ear disease and hearing loss in other remote communities.’¹⁰⁹ Thirty two per cent of APY Lands

¹⁰⁵ Ibid 14 [14.1].

¹⁰⁶ The Anangu Lands Paper Tracker, *Suicide and self-harm on the APY Lands: police data* (September 2013) The Anangu Lands Paper Tracker <<http://www.papertracker.com.au/2013/09/suicide-and-self-harm-on-the-apy-lands-police-data/>>; data for 2013 current to 7 August 2013 only.

¹⁰⁷ Ibid.

¹⁰⁸ E P Mullighan, ‘Children on Pitjantjatjara Yankunytjatjara (APY) Lands Commission of Enquiry: A Report into Sexual Abuse’ (2008) 162.

¹⁰⁹ Cathy Jackman, ‘Hearing Impairment: Access and Opportunity’ (2012) 22(1) (March) *Special Education Resource Unit : SERUpdate* 9, 10; see also Government of South Australia, ‘Sumission No

school-aged children suffered from perforated ear-drums compared with only 1.34 per cent of non-Indigenous children in metropolitan Adelaide.¹¹⁰ It is reported that hearing loss in Australia's Indigenous population is the highest in the world, 'surpassing the World Health Organization's pandemic criteria.'¹¹¹

Health and welfare issues, and impacts related to hearing loss, are illustrated in Figure 3.5:

Issues		Impact
Poverty	Otitis Media ¹¹²	Infant health & well being
Health		Hearing loss
Disability		Educational outcomes
Education		Schooling experience
Maternal and infant health		Emotional & social development
Housing		Speech & language development
Employment		School attendance
Crime		Self-esteem
		Future health & employment

Figure 3.5 — Issues and impacts of hearing loss in children in APY Lands.¹¹³

As reported by Cathy Jackman, '[h]earing loss [in APY children] affects learning, school retention, social and emotional development and can limit long-term opportunities for study and employment.'¹¹⁴ Moreover, Linnette Sanchez reports:

Hearing impairment ... will impact significantly on a child's ability to learn, particularly where a second language is the means of instruction, with global consequences for the acquisition of basic literacy and numeracy. Hearing impairment thus contributes to the cycle of poverty and disadvantage so common in remote indigenous communities.¹¹⁵

145 to Commonwealth of Australia, Senate Community Affairs Refereces Committee, *Inquiry into hearing health in Australia* (SA Government, 9 October 2009) 23 [5.1].

¹¹⁰ Linnett Sanchez, 'Submission No 31 to Commonwealth of Australia, Senate Community Affairs Reference Committee, *Inquiry into hearing health in Australia*' (Flinders University, 8 October 2009) 2 [Table 1].

¹¹¹ Government of South Australia, above n 109, 23 [5.1].

¹¹² See Jackman, above n 109, 9 — Otitis Media (OM) is an inflammation of the middle ear.

¹¹³ Ibid 9.

¹¹⁴ Ibid 10.

¹¹⁵ Sanchez, above n 110, 3.

Hearing problems in the APY Lands ‘begins in infancy, rolls on through childhood and frequently into adulthood ... [with] major consequences for education and global underachievement.’¹¹⁶

Because of language and cultural differences, hearing loss often goes unrecognised in APY people.¹¹⁷ Hearing loss affects communication with others and has the potential for serious ramifications for those in conflict with the criminal justice system.¹¹⁸ More specifically, there are severe consequences for defendants during arrest or reporting by police, during questioning by police and making possible confessions, and applications for police bail. Hearing problems may even affect a person’s fitness to plead before a court.¹¹⁹ Other detrimental effects may present themselves during dealings with defence solicitors and may even have a bearing on any sentence imposed.¹²⁰ These issues will be further discussed in chapters 4, 5 and 6.

D *Petrol Sniffing*

Sniffing volatile solvents, including petrol, is a world-wide problem, particularly for Indigenous peoples and minority groups, and has been so for many decades. Its use by Aboriginal people is rumoured to have begun during World War II when introduced by US servicemen in the north of Australia, but is reported to have commenced in the APY Lands in the 1960s.¹²¹ Petrol sniffing by young Anangu was first noted by Edwards at Ernabella in about 1970, and had developed into a serious problem at Amata by 1976.¹²² I have personally witnessed many young Anangu sniffing petrol at all APY communities during my policing of the Lands in the late 1970s and in the mid-1980s.

Those involved in petrol sniffing (sniffers) on the Lands typically use tin cans, often partly concealed inside a jumper, or by using wire contraptions, thereby allowing constant facial contact with the tin and petrol fumes whilst walking or sitting. Similar

¹¹⁶ Ibid 6.

¹¹⁷ Damien Howard et al, ‘Aboriginal Hearing Loss and the Criminal Justice System’ (1993) 3(65) (December) *Aboriginal Law Bulletin* 9.

¹¹⁸ Ibid.

¹¹⁹ See, eg, *Ebatarinja v Deland* (1998) 194 CLR 444.

¹²⁰ Howard et al, above n 117, 10–11.

¹²¹ Law Society of South Australia, ‘The Effects of Petrol Sniffing: Seminar Papers’ (Paper presented at the The Effects of Petrol Sniffing Seminar presented by the Aboriginal Issues Committee of the Law Society of South Australia, Adelaide South Australia, 3 August 2000) — *Introduction* Dr Maggie Brady, 1.

¹²² Ibid — *Comments* Rev Bill Edwards, 1–2.

methods are used when sniffers sleep, often with disastrous results when petrol fumes are ignited by campfires, causing serious burns.¹²³ Sniffing petrol causes a variety of extremely serious health problems, including central nervous system depression, hallucinations, and chest infections, including severe and chronic bronchitis and pneumonia, and sometimes seizures.¹²⁴ Permanent brain damage, with resultant mental impairment can also result from chronic, long-term sniffing.¹²⁵ There have been approximately 35 deaths caused by sniffing over a period of 20 years.¹²⁶ Of equal concern is that ‘one of the consequences of petrol sniffing seems to be that its victims are more likely to engage in conduct that brings them into conflict with the law’¹²⁷ — confirmed by my policing experiences on the Lands when an inordinate number of offenders were known chronic petrol sniffers.

Coroner Wayne Chivell outlined the causes of petrol sniffing:

Clearly, socio-economic factors play a part in the general aetiology of petrol sniffing. Poverty, hunger, illness, low education levels, almost total unemployment, boredom and general feelings of hopelessness form the environment in which such self-destructive behaviour takes place.

That such conditions should exist among a group of people defined by race in the 21st century in a developed nation like Australia is a disgrace and should shame us all.¹²⁸

Little wonder the Coroner made the latter comment when viewed from the perspective of the data in Figure 3.6:

Community	1984	1987	1994	1995	1996	1997	1998	1999	2000	2002	2002	2004
Pipalyatjara, Kalka, Watarru	n/a	10	23	11	6	2	3	2	4	4	5	11
Amata	56	26	36	34	18	24	23	29	37	51	28	63
Pukatja	26	31	13	9	11	10	17	13	13	45	42	57
Kaltjiti	30	16	50	35	11	26	37	26	17	28	19	49
Mimili	n/a	15	17	12	0	0	2	3	1	1	2	4

¹²³ Ibid — *Comments* Dr Nick Williams, 2, 4.

¹²⁴ Ibid — *Comments* Dr Nick Williams, 5–6.

¹²⁵ Ibid — *The Sting in Mental Impairment Reforms*, MF Gray QC, 1.

¹²⁶ Summers, above n 34, 2.

¹²⁷ Law Society of South Australia, above n 121 — *Opening Remarks*, Chief Justice John Doyle, 3.

¹²⁸ Chivell, above n 17, 50 [7.1].

Community	1984	1987	1994	1995	1996	1997	1998	1999	2000	2002	2002	2004
Iwantja	n/a	46	39	36	39	29	24	29	39	35	17	38
Totals	150-170*	144	178	137	85	91	105	102	111	166	116	222
% Population	10%	7.5%	8.4%	6.4%	3.8%	3.6%	4.1%	3.5%	4.2%	6.2%	4.5%	8.4%

Figure 3.6 — Summary of survey data of petrol sniffing in the APY Lands 1984–2004¹²⁹
(* this total is a minimum estimate based on other data)

With Federal Government funding, BP Australia began rolling out their Opal fuel across the APY Lands from 2005. Opal petrol contains no lead and low levels of aromatic hydrocarbons, the main ingredients which attract sniffers.¹³⁰ The positive effect of Opal fuel and the Department for Communities and Social Inclusion's (DCSI) coordination of several Aboriginal youth programs across the Lands has seen a dramatic decrease in the numbers of sniffers on the Lands.¹³¹ From September 2006 it has been an offence under APY Land Rights Act to sell, supply or possess non-Opal petrol (or any other form of sniffable substance) on the APY Lands. Police have statutory authority to seize any motor vehicle used in connection with such offending.¹³² Unfortunately, petrol sniffing is not the only serious social/health problem affecting people on the Lands.

E Violence and Sexual Abuse

Poor health and welfare standards, fuelled by petrol sniffing, the use of illicit drugs, gambling and alcohol, have resulted in high levels of violence and sexual abuse experienced by Anangu for decades — see, for example, Figure 3.7. Violence and sexual abuse offences are the major reasons for incarceration of Anangu offenders.

Women and children in remote communities are most vulnerable, experiencing 'domestic and family violence at a significantly higher rate than the general population.'¹³³ The problem is not new. In 1994, out of concerns for increasing

¹²⁹ Ibid 47 [6.7] — note that this data is from a variety of sources.

¹³⁰ The Anangu Lands Paper Tracker, *Opal Fuel: mandating its supply in certain locations* <<http://www.papertracker.com.au/archived/opal-fuel-mandating-its-supply-in-certain-locations/>>.

¹³¹ The Anangu Lands Paper Tracker, *Jacky Costanzo on DCSI Youth Programs* <<http://www.papertracker.com.au/radio/jacky-costanzo-on-dcsi-youth-programs/>>; see also NPY Women's Council, 'NPY Women's Council: Advocacy Substance Abuse: Cannabis' (Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council (NPYWC), 2010) <https://www.google.com.au/?gws_rd=ssl#q=drug+use+on+the+apy+lands>.

¹³² *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA) s 42D.

¹³³ South Australian Government and Department of State Development, *Case workers to support domestic violence prevention and justice in APY Lands* <<https://statedevelopment.sa.gov.au/news->

domestic violence, the NPY Women's Council began a pilot program to tackle the problem.¹³⁴ The Council reported that '[i]n 2007 and 2008, six women from the NPY region died following assaults by their husbands.'¹³⁵

In 2008, the Mullighan Report stated that 'sexual abuse of children on the Lands has been widespread throughout the communities for many years.'¹³⁶ The Report also stated that:

It occurs in the context of destructive and disorganised communities, poor health, poverty, alcohol and other substance abuse, the breakdown of traditional law and authority, generational cycles of abuse and neglect of children, violence, fear and a general powerlessness of many women. In many ways, conditions on the Lands are comparable to a third world country.¹³⁷

The evidence of child sexual abuse was identified by the Report as including 'underage pregnancies, sexually transmitted infections ... young boys and girls living together, children ... giving sex for petrol, drugs or money, sexualised behaviour in children, and physical injury, particularly to genitals of children.'¹³⁸

In 2010, as a result of the Mullighan Report, three new police stations were opened in the APY Lands at Mimili, Ernabella and Amata.¹³⁹ The South Australian Minister for Aboriginal Affairs and Reconciliation reported that the new stations:

have provided police with resources to engage with APY Lands residents, and we are starting to see positive changes in the communities, including reduced crime ... the Governments [Federal and SA State] are committed to protecting children and families on the APY lands by strengthening the police presence and providing safe accommodation.¹⁴⁰

However, despite many of the Mullighan Report's 43 recommendations having been acted upon by the SA Government and SAPOL, eight years later in 2014 it was reported

releases/all-news-updates/case-workers-to-support-domestic-violence-prevention-and-justice-in-apy-lands/.

¹³⁴ NPY Women's Council, 'Domestic and Family Violence Service: Fact Sheet 8' (2010) 1.

¹³⁵ *Ibid.*

¹³⁶ Mullighan, above n 108, v.

¹³⁷ *Ibid.*

¹³⁸ *Ibid* xii–xiii.

¹³⁹ See Jenny Macklin, MP, 'New police stations officially opened in the APY Lands' (Media Release, 11 November 2010) < <https://formerministers.dss.gov.au/13985/new-police-stations-officially-opened-in-the-apy-lands/>>.

¹⁴⁰ *Ibid.*

that there have been significant delays by authorities in the investigation of reported sexual abuse matters.¹⁴¹ The 2013 Fifth (and final) Annual Report by the SA Minister for Education and Child Development reported that numerous Government agencies are involved in following up on the Mullighan Report's recommendations.¹⁴² There are two SAPOL assault victim management officers and one specialist sex crime investigator stationed on the Lands.¹⁴³ There are also six Families SA child protection officers based at Umuwa, Mimili, Fregon, Ernabella, Amata and Pipalyatjara; Indulkana is serviced by an officer at Marla.¹⁴⁴ Mental health services to children and young people on the Lands is provided by the Women's and Children's Health Network (WCHN), and by the Child and Adolescent Mental Health Service (CAMHS).¹⁴⁵ From my observations during a visit to the APY Lands in 2016, it appears many WCHN and CAMHS officers are FIFO workers. With assistance from their Northern Territory and Western Australian counterparts, the South Australian Department for Correctional Services are also involved in a Cross Borders Indigenous Family Violence Program.¹⁴⁶ This program is aimed at Anangu men who have been convicted of family violence offences. Despite these resources, in 2017 the then Premier of South Australia, Jay Weatherill, announced a \$1m funding package to address domestic violence in the APY Lands.¹⁴⁷ He stated that the problem is 'compounded by ... distance, isolation and the ability to access services, and the capacity of service providers to provide a culturally appropriate, coordinated service response that is informed by the local community,'¹⁴⁸ It seems people living on the Lands face an uphill battle in almost every facet of their daily lives with many coming under adverse attention of the criminal justice system as will be examined later in this chapter on crime statistics.

¹⁴¹ ABC News, 'APY abuse: Staffing questions', (ABC1 Adelaide), 14 August 2014 (Jessica Harmsen) <<http://search.informit.com.au.proxy.library.adelaide.edu.au/documentSummary;dn=TSM201408140096;res=TVNEWS>>.

¹⁴² See generally, South Australian Government, 'Fifth Annual Report by the Minister for Education and Child Development to the Children on Anangu Pitjantjatjara Yankunytjatjara (APY) Lands Commission of Inquiry: A report into sexual abuse' (November 2013).

¹⁴³ Ibid 66.

¹⁴⁴ Ibid 14.

¹⁴⁵ Ibid 21.

¹⁴⁶ See Matthew Willis and Sarah Holcombe, 'Evaluation of the Cross Borders Indigenous Family Violence Program; (Australian Institute of Criminology, November 2014) 4; see also Peter Whellum, 'Missed Opportunities for Culturally Appropriate Imprisonment of APY Offenders: The Cross Border Justice Act 2009 (SA)' (2017) 8(28) *Indigenous Law Bulletin* 20, 22.

¹⁴⁷ South Australian Government, above n 133.

¹⁴⁸ Ibid.

F *Illicit Drugs*

Illicit drug use, like petrol sniffing, has a devastating effect on Indigenous peoples around the world.¹⁴⁹ The use of cannabis (gunja) is a major problem in the Lands communities and of great concern to the Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council (NPYWC) as a contributing factor of mental health problems, 'suicide, fighting (especially when supplies run out), domestic and family violence and food stealing by hungry, stoned users.'¹⁵⁰ Although there is a lack of researched data, cannabis use is reported to have 'outstripped alcohol in terms of the level of use and resulting damage' within the communities — there is a suggestion that cannabis use has increased because of the 'enormous reduction in petrol sniffing in the regions since the introduction of Opal low octane, low aromatic fuel in 2005.'¹⁵¹

While penalties apply to the use and supply of cannabis,¹⁵² policing is difficult in such a remote location where there are a large number of access roads to the region. Illicit drug use in the Lands is not limited to just cannabis but also includes 'MDMA (ecstasy), amphetamines and other drugs.'¹⁵³ Figures 3.7 and 3.8 provide some insight into the problems of illicit drug offending by Indigenous people in the Lands and in South Australia generally. Although the data in Figure 3.7 reveals illicit drug offences by APY people is only half that of other South Australians, Figure 3.8 reveals that the number of Aboriginal offenders is double that of non-Aboriginal people.

G *Alcohol*

Although alcohol abuse is an Australia-wide problem, it is of serious concern in the APY and NPY Lands.¹⁵⁴ While statistics relating to only the APY Lands has been difficult to obtain, the number of 'alcohol-related Aboriginal deaths [in Central Australia] — 14.6 per 10,000 — has been calculated at three times the national (Aboriginal) rate of 4.17.'¹⁵⁵ In Queensland, South Australia, Western Australia and the

¹⁴⁹ K S Kylie Lee, et al, 'Cannabis use in remote Indigenous communities in Australia: endemic yet neglected' (2009) 190(5) *Medical Journal of Australia* 228, 228.

¹⁵⁰ NPY Women's Council, above n 131, 1.

¹⁵¹ *Ibid.*

¹⁵² *Controlled Substances Act 1984* (SA) pt 4.

¹⁵³ NPY Women's Council, above n 131, 2; MDMA is the abbreviation for 3,4-methylenedioxy-methamphetamine.

¹⁵⁴ See, eg, NPY Women's Council, 'NPY Women's Council: Advocacy Substance Abuse: Alcohol' (Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council (NPYWC), 2010) 1–3.

¹⁵⁵ *Ibid.* 1.

Northern Territory, Aboriginal death rates related to alcohol ‘have been estimated at between five and nineteen times higher [than for non-Aboriginal people].’¹⁵⁶ ABS data reveal that nationally, about ‘one in six Aboriginal and Torres Strait Islander people aged 15 years and over (17%) drank alcohol at chronic risky/high risk levels, similar to the rate reported in 2002 (15%).’¹⁵⁷

Just as in non-Indigenous communities, alcohol abuse in the Lands contributes to high levels of domestic violence, societal breakdown and inevitable adverse attention by police and the criminal justice system; it has also been linked to the high incidences of child abuse in the Lands.¹⁵⁸ Alcohol abuse has been identified as a contributing factor towards suicide and self-harm among APY people.¹⁵⁹

Despite the Lands being declared alcohol-free (dry),¹⁶⁰ and dry-zones and severe restrictions being placed upon the sale and supply of alcohol¹⁶¹ at Coober Pedy and the nearby Mintabie Opal Fields (part of the APY Lands), it is still readily available at nearby Marla and Cadney Homestead Road-house. Dry-zones and severe restrictions also apply in Alice Springs and other alcohol outlets in the Northern Territory, but there appears to be a thriving illicit trade of alcohol on the Lands.

H Gambling

Gambling has been identified as a serious contributing factor towards sexual abuse and violence, where ‘[s]exual favours are given by young persons for money to acquire drugs or to continue gambling’.¹⁶² It has been identified as being one of the reasons

¹⁵⁶ Ibid.

¹⁵⁷ ABS, ‘The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples’ (Cat. No. 4704 Australian Bureau of Statistics, Canberra, 2010) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/lookup/4704.0Chapter700Oct+2010>>.

¹⁵⁸ Mullighan, above n 108, xiv.

¹⁵⁹ Chivell, above n 17, iii [18–19].

¹⁶⁰ *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA) s 43 — provisions for By-Laws prohibiting the consumption, possession and supply of alcohol on the APY Lands; see, in particular, *Pitjantjatjara Yankunytjatjara Land Rights (Control of Alcoholic Liquor) By-Laws 1987* (SA) (gazetted in the *South Australian Government Gazette* 1987, 1543).

¹⁶¹ See, eg, *Liquor Licensing Act 1997* (SA) s 131, providing legislative authority for gazetted ‘dry zones’ in SA; see, in particular, Consumer and Business Services Internet site for details regarding restrictive sales of alcohol at Coober Pedy. <<http://www.cbs.sa.gov.au/wcm/licensing-and-registration/liquor/dry-areas/>>.

¹⁶² Mullighan, above n 108, xiv.

why APY communities requested voluntary income management support, introduced by the Federal Government in October 2012.¹⁶³

IV CRIME STATISTICS

A APY Lands

The statistics in Figure 3.7 reveal an alarming crime rate in the APY Lands when compared with the rest of the state:¹⁶⁴

Offence type*	APY Lands – rate / 1,000 people*	Rest of state – rate / 1,000 people*	APY Lands variation from rest of state
Against person	73.92	10.75	+588%
Sexual offences	14.12	1.20	+1083%
Robbery and extortion	0.00	0.64	-100%
Against property	104.38	61.31	+70%
Against good order	78.75	23.32	+238%
Drug offences	1.49	3.19	-53%
All driving offences	65.75	14.57	+351%
All other offences	35.66	0.64	+5,472%
Total offences	374.07	115.62	+224%

Figure 3.7 — 2012 Crime Rate / 1,000 residents – comparison between APY Lands and the rest of SA. (Base Information marked * © OCSAR 2013)

Despite OCSAR's caution against using rates of crime where the population is less than 3000 people, the statistics remain revealing and are consistent with the general Indigenous crime rates for South Australia as a whole, as will be seen below. From the above table, APY Lands Aboriginal people have an offending rate which far exceeds that of other people in the rest of South Australia.

¹⁶³ Ilan Katz and Shona Bates, 'Voluntary Income Management in the Anangu Pitjantjatjara Yankunytjatjara (APY) Lands' (Social Policy Research Centre UNSW, September 2014) 1.

¹⁶⁴ Office of Crime Statistics and Research – Crime Mapper Internet site <<http://www.ocsar.sa.gov.au/maps.htm>>.

B South Australia

The alleged offender rate per 100 000 head of population by principal offence and Aboriginal and Torres Strait Islander (ATSI) people in SA, shown in Figure 3.8, is equally alarming:¹⁶⁵

Offence group*	Aboriginal and Torres Strait Islander rate*	Non-Aboriginal rate*	Variation of ATSI from non-Aboriginal people
Homicide	9.8	2.7	+263%
Acts intended to cause injury	4,083.4	298.0	+1,270%
Sexual assault	244.2	45.0	+443%
Dangerous/negligent acts	68.4	5.4	+1,167%
Abduction/harassment	87.9	16.3	+439%
Robbery/extortion	283.3	10.4	+2,624%
Unlawful entry with intent	690.3	28.3	+2,339%
Theft	1,615.1	180.1	+797%
Fraud/deception	156.3	30.4	+414%
Illicit drug offences	302.8	147.5	+105%
Prohibited/regulated weapons	560.1	91.2	+514%
Property damage	752.2	73.2	+928%
Public order offences	1,758.4	148.0	+1,088%
Offences against justice	534.0	73.0	+632%
Misc. offences	61.9	23.8	+160%
Total	11,191.8	1,174.4	+853%

Figure 3.8 — 2013-14 SA offender rate per 100,000 population. (Base information marked *, © Office of Crime Statistics and Research)

South Australian ATSI people make up only 1.7 per cent of the state's population,¹⁶⁶ yet have an alleged overall offending far in excess of non-Aboriginal offenders. Just as disturbing is that in 2015–16 Aboriginal people made up 26.5 per cent of the total South

¹⁶⁵ Office of Crime Statistics and Research, 'Australian Bureau of Statistics: Recorded Crime - Offenders 2013-14: South Australian Perspective' (South Australian Attorney-General's Department, March 2015) 18 <<http://www.ocsar.sa.gov.au/maps.html>>.

¹⁶⁶ ABS, Population Distribution, Aboriginal and Torres Strait Islander Australians, 2006 <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4705.0>>.

Australian prison population¹⁶⁷ — this figure rose from 16.8 per cent in 2004.¹⁶⁸ Between 1988 and 2012, South Australia's Indigenous prison population rose by 101.7 per cent.¹⁶⁹ These statistics reveal a huge social challenge, requiring a whole of government response, from tackling domestic violence, drug abuse, unemployment, poor health and education. Reforming criminal justice is part of the complex mix of responses required.

C Over-Representation in the Criminal Justice System

The 1991 Royal Commission into Aboriginal Deaths in Custody makes it clear that historical factors are an important consideration regarding the reasons for the over-representation of Aboriginal people in the criminal justice system — the report notes:

It is important that we understand the legacy of Australia's history, as it helps to explain the deep sense of injustice felt by Aboriginal people, their disadvantaged status today and their current attitudes towards non-Aboriginal people and society.¹⁷⁰

Thalia Anthony refers to a culture of 'constructing the indigenous criminal' when recognising Aboriginality during criminal sentencing, where recognition is owned by a non-Indigenous postcolonial state, which objectifies indigeneity and determines acceptable forms.¹⁷¹ The courts categorise relationships into the 'recogniser' and the 'recognised' to deliver unilateral control of 'recognisable' indigeneity acceptable to the state. Anthony argues that the result is both non-recognition and misrecognition of Aboriginal people and communities that serve to 'uphold the legitimacy of the white community and delegitimise the Indigenous community.'¹⁷²

Further historical features are alluded to by Heather McRae et al by the 'imposition of an alien criminal justice system ... non-recognition of Indigenous laws and justice mechanisms, the perpetration of violence in the name of criminal justice, and the role of

¹⁶⁷ Department for Correctional Services, 'Annual Report 2012-13' (Department for Correctional Services, June 2013) 44.

¹⁶⁸ Department for Correctional Services, 'Annual Report 2003-04' (Department for Correctional Services, October 2004) 23.

¹⁶⁹ Don Weatherburn, *Arresting Incarceration: Pathways out of Indigenous Imprisonment* (Aboriginal Studies Press, Reprinted ed, 2014) 26.

¹⁷⁰ Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* vol 2, ch 10 [Introduction]; see also McRae et al, above n 50, 511–12 [10.210].

¹⁷¹ Thalia Anthony, *Indigenous People, Crime and Punishment* (Routledge, 2013) 3.

¹⁷² *Ibid* 8.

police in oppressing Indigenous people.’¹⁷³ While these features will be discussed in length in chapters 4 and 5, Chris Cunneen observes several contributing factors:

- Offending patterns (particularly over-representation in offences likely to lead to imprisonment such as serious assaults, sexual assaults and property offences)
- The impact of policing (particularly the adverse use of police discretion and ‘over-policing’ in Aboriginal communities)
- Legislation (particularly the impact of laws giving rise to indirect discrimination such as the *Summary Offences Act 1970*, the *Children’s (Protection and Parental Responsibility) Act*)
- Factors in judicial decision-making (particularly bail conditions, the weight given to prior record, the availability of non-custodial options)
- Environmental and locational factors (particularly the social and economic effects of living in small rural communities)
- Cultural difference (such as different child-rearing practices, the use of Aboriginal English, vulnerability during police interrogation)
- Socio-economic factors (in particular, high levels of unemployment, poverty, lower educational attainment, poor housing, poor health)
- Marginalisation (in particular, drug, alcohol and other substance abuse; alienation from family and community)¹⁷⁴

Cunneen concludes that ‘[b]y analysing the interconnectedness between these various factors, debates around simplistic dichotomies (such as police behaviour versus Aboriginal criminal offending) can be avoided.’¹⁷⁵

Although written from a New South Wales perspective, Cunneen’s observations are relevant to this thesis. My research, personal experiences and available literature reveal that all factors mentioned are evident and magnified in the APY Lands. While environmental, socio-economic and marginalisation factors have already been examined in this chapter, offending patterns and imprisonment rates are amplified in the APY Lands because of their remoteness and lack of employment opportunities, counselling

¹⁷³ McRae, et al, above n 50, 512 [10.210].

¹⁷⁴ Ibid 514 [10.230].

¹⁷⁵ Ibid, citing Chris Cunneen, ‘New South Wales Aboriginal Justice Plan: Discussion Paper’ (2002) 33–35.

resources, and readily available legal representation. As will be examined in chapter 5, with court trials only being heard at far-distant Coober Pedy, there is a propensity for pleas of convenience to be entered by alleged offenders, whether guilty or not. Judicial and police decision-making often lack sufficient understanding of the important issues of cultural differences and remoteness.

V CONCLUSIONS

This chapter has focussed on the extreme disadvantage of Anangu across a wide range of socio-economic indicators in addition to continuing cultural differences. Anangu have been treated differently, and their socio-economic outcomes are so much worse than the rest of the Australian population that they have suffered injustice from an objective perspective. The chapter reveals that criminal justice on the APY Lands cannot be pursued in the same manner as in other contexts, including that of other Aboriginal communities in South Australia.

The issues discussed are just part of the overall puzzle. Given the range of cultural and socio-economic factors at play, they present a huge challenge for police, the courts and others involved in the administration of justice on the APY Lands. They emphasise the importance of a critical awareness of these challenges for justice to be effective. It is not just about resources but being sensitive to and responding appropriately to the range of issues with wisdom and sensitivity, requiring appropriate training and support by all involved. These questions will be explored further in the next chapter on policing in the APY Lands.

CHAPTER 4: POLICING THE APY LANDS

I INTRODUCTION

This chapter examines contemporary policing practices and associated issues in the Anangu Pitjantjatjara Yankunytjatjara (APY) Lands. To provide context, the chapter provides a brief historical overview of policing the north-west of South Australia, obtained from the available literature.¹ Although this thesis focuses on the role of police in the administration of criminal justice, it needs to be acknowledged that police have a wider range of roles within APY communities than simply matters related to criminalisation. They include, for example, reassuring and protecting communities regarding crime and disorder by upholding the law, preserving the peace and the prevention of crime under s 5 of the *Police Act 1988* (SA).

The major issues identified in this chapter include the current Community Constable program, staffing remote police stations, APY Lands police recruiting incentives, fly-in, fly-out (FIFO) policing, and accessibility of police services located in the Lands. Of particular relevance are those regarding a lack of cultural awareness by police of Anangu and their effect on police cautions (the right to silence), the use of interpreters and excessive police bail conditions. Issues surrounding cultural awareness, this thesis contends, are central to the recognition of Anangu self-determination, the importance of which is acknowledged by the State Government and its criminal justice agencies. Moreover, this chapter argues that many issues related to APY policing are directly related to cultural and language deficits in police training and that identified problems would be substantially mitigated by a better understanding of Anangu culture and language. The chapter reveals that appropriate cultural awareness training is essential and must be provided to officers before and during their postings to the APY Lands.

¹ See, eg, Chas Hopkins, *South Australia Police 1838 - 2003: A history of the development and operations of the force from its establishment* (Digital Productions, 2005); John White, 'Indulkinna Police Camp: Near Granite Downs Station, Far North' (2016) November/December 2016 *SA Police Historical Society 'Hue and Cry' (Official Newsletter)*; F A Richardson, 'Police / Aboriginal Relations in South Australia' (South Australian Police Department, 1985).

II APY LANDS POLICING — OVERVIEW

An overview of police patrolling practices in the APY Lands from the late 19th century to the present time provides historical context to the contemporary issues that follow.

A *Policing the North West*

Due to its remoteness, policing of South Australia's far-north and north-west did not occur until after Oodnadatta and its local police station was established in 1891 when the first major section of the then Port Augusta to Alice Springs railway reached that area. Oodnadatta became the rail-head for the next 30 years until the railway line was completed to Alice Springs in 1929.² The original railway to Alice Springs through Oodnadatta was closed in 1980 with the opening of the new railway line further west through Tarcoola and Marla — the line was extended to Darwin in 2004. The Oodnadatta police station continues to service the local area today.

A police camp with one mounted constable was established in 1915 at Indulkinna, eight miles (13 kilometres) north of Indulkinna Station and just west of Granite Downs Station homestead,³ not far from the present Indulkana (Iwantja) Aboriginal Community, 58 kilometres north of Marla. This camp closed in 1920 when police patrols to the North West Aboriginal Reserve (the Reserve) shifted to officers stationed at Oodnadatta. Patrolling by horse and camels, officers were often absent from Oodnadatta for a month or more.⁴ Camel patrols ended in the early 1950s.⁵ The first motorised police patrol for the north-west of SA from Oodnadatta was in June 1940 when a Chevrolet truck was used to 'investigate cattle rustling in the north west of the State, and protect aborigines'.⁶ Three-monthly vehicular patrols to the Reserve were conducted by Oodnadatta police in the 1960s.⁷ In the 1970s, weekly patrols were introduced with staff increases at Oodnadatta. The increased staffing was a police

² White, above n 1; see also Flinders Ranges Research Internet site <<http://www.southaustralianhistory.com.au/oodnadattatown.htm>>.

³ Ibid.

⁴ Ibid.

⁵ Hopkins, above n 1, 206, 216.

⁶ *The Australian Women's Weekly* (1933 – 1982), Saturday 13 April 1940, page 2 <<http://trove.nla.gov.au/ndp/del/page/4719176?zoomLevel=1>>; see Appendix 1 of this thesis, Figure A1.22.

⁷ Richardson, above n 1, 7.

initiative, ‘provided with the stated aim of assisting the welfare and advancement of the Aboriginal population and were not provided on the basis of increased workload.’⁸

Oodnadatta patrols continued until December 1984 when a police station was opened at the then newly established township of Marla, 200 kilometres west on the Stuart Highway.

Following political pressure for an increase in policing within the Reserve, Commonwealth Government funding was obtained in 1975 for double-garage style buildings to be established as police stations, and for Land Rover 4WD vehicles at Indulkana, Ernabella and Amata for use by patrols from Oodnadatta.⁹ In 1976, further funding resulted in a police aircraft being based at Woomera and used exclusively to convey two Oodnadatta officers on weekly patrols to the Reserve.¹⁰ This continued until the responsibility for policing the Lands was transferred to the Marla police station, opened in 1984. Every Monday morning two officers were flown to one of the three Reserve community police stations, where a police vehicle was collected for use throughout the patrol.¹¹ Officers usually returned to Oodnadatta by aircraft the following Friday afternoon.¹² Before Marla Police Station opened in 1984, Oodnadatta officers also had the policing responsibility for the whole of the northern areas of the state, a vast area extending from the Western Australian to the Queensland borders.

B *Increasing Police Presence in the APY Lands*

APY Lands policing continued from Marla, when two of the eight officers from that station conducted weekly vehicular patrols. As a result of APY Anangu expressing dissatisfaction with police service on the lands, and a ‘desire for a permanent police presence at the main settlements’,¹³ staffing levels at Marla increased to 11 officers by

⁸ Ibid.

⁹ See Appendix 1, Figures A1.1–10.

¹⁰ Richardson, above n 1, 7 and Appendix A, 2 [2.3]; see also Hopkins, above n 1, 231; personal knowledge as the second officer in command at Oodnadatta 1978–1980 and as a police pilot in the SA Police Air Wing 1980–82; see Appendix 1, Figure A1.1.

¹¹ The North West Aboriginal Resererve became the Anangu Pitjantjatjara Yankunytjatjara (APY) Lands in 1981 after enactment of the *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA).

¹² See generally Richardson, above n 1; the timing of patrols was gained from personal experience during my posting to the Oodnadatta police station in the late 1970s.

¹³ SAPOL, ‘Community Constable & Police Aboriginal Liaison Officer Scheme: APY & Yalata Lands: Evaluation and Options’ (South Australia Police, June 2011) 5.

2003.¹⁴ At that time ‘[f]our police officers were deployed to the Anangu Pitjantjatjara Lands at all times, two flown in from Adelaide, and two Marla-based officers.’¹⁵

Although 200 kilometres closer to the Lands than Oodnadatta, road patrols from Marla to the APY communities nevertheless took considerable time due to vast distances and the poor condition of the unsealed roads within the Lands — see Figure 4.1:

Driving from	Distance	Distance from Marla	Driving time between communities (hrs) ¹⁶	Driving time from Marla (hrs)
Marla to Indulkana	58	58	0.8	0.8
Indulkana to Mimili	66	124	1.0	1.8
Mimili to Fregon	77	201	1.1	2.9
Fregon to Ernabella	65	266	1.0	3.9
Ernabella to Amata	138	404	2.0	5.9
Amata to Pipalyatjara	206	610	3.0	8.9

Figure 4.1 — Distances (in kilometres) and travelling times in the APY Lands

These vast distances and driving times were hardly conducive to rapid response for matters requiring urgent police attendance. While considerable distances from police are not unknown in other remote police districts, no other remote area has the high population density or crime rates of the Lands.¹⁷ Marla police also patrol nearby pastoral stations, Mintabie Opal Fields and the Stuart Highway.¹⁸ Due to the response times from Marla, increasing crime rates and the recommendations of the 2008 Mullighan Commission of Enquiry into sexual abuse,¹⁹ a total of 23 sworn officers are now stationed in the APY Lands. They include two child and family investigation/crime prevention officers and a detective based at Umuwa. Operating on a FIFO arrangement, these officers work ‘a three week rotation of two weeks on and one

¹⁴ Wayne Chivell, ‘Inquest into the deaths of Kunmanara Ward, Kunmanara Ken, Kunmanara Ryan and Kunmanara Cooper - Finding of the State Coroner’ (2005) [11.3].

¹⁵ Ibid [11.5].

¹⁶ Based on an average driving speed of 70 km/hr in good road and weather conditions.

¹⁷ As discussed in chapter 3.

¹⁸ Mintabie Opal Fields are part of the APY Lands, operating under a special lease under the *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA) div 4. Permits to enter the fields are required, see s 29C.

¹⁹ E P Mullighan, ‘Children on Pitjantjatjara Yankunytjatjara (APY) Lands Commission of Enquiry: A Report into Sexual Abuse’ (2008) — hereafter ‘the Mullighan Report’.

week off.’²⁰ Including Marla officers who police Indulkana, 28 SAPOL officers have direct policing responsibilities for the Lands.²¹

C *Aboriginal Police and Community Constables Programs*

From the 1970s, police patrolling the APY Lands utilised an unsworn Aboriginal Police Warden system. As a result of a joint Anangu and police initiative, an Anangu man was chosen by each community to assist and liaise with visiting police and to act as a community peace-keeper. Wardens were not employed by SAPOL.²²

In 1984 SAPOL reported that the Warden system had not been consistently effective. They had received no proper training or relevant education; had no statutory authority; received inconsistent support from police patrols and SAPOL generally; had been denied the use of police facilities and, being employed by individual communities, were subject to dismissal whenever there were difficulties.²³ For these reasons, the Warden scheme was abandoned in 1985 soon after the establishment of the Marla police station.

In 1986, following the enactment of the *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA), SAPOL introduced a Police Aide scheme on the Lands. Four Anangu men were trained by resident white sworn officers at Indulkana, Fregon, Ernabella and Amata for 12 months.²⁴ After 12 months, the four SAPOL officers were removed from the Lands, being replaced by a single Police Aide supervisor at Amata. The Police Aide scheme transformed into the current Community Constable program in the mid-1990s.²⁵ The original plan called for 10 Aboriginal Community Constables to

²⁰ John White (retired Assistant Commissioner of SA Police), draft version of his new book about the history of police stations in South Australia (proposed title: *More than just Bricks and Mortar: South Australia Police Stations 1838 — 2015*, draft chapter ‘Anangu Pitjantjatjara Yankunytjatjara (APY Lands) Police’ 3.

²¹ The number of officers on site in the APY Lands depends upon normal staff rostering, days off and annual leave, etc.

²² SAPOL, above n 13, 5 [2]; see also Judith Worrall, ‘European Courts and Tribal Aborigines - a Statistical Collection of Dispositions from the North-West Reserve of South Australia’ (1982) 15 (March) *Australian and New Zealand Journal of Criminology* 47, 52.

²³ Richardson, above n 1, 8-9 [4.1.4].

²⁴ SAPOL, above n 13, 5; in fact, trials of Aboriginal Aides/Community Constables were in force during at least the late 1970s when I was stationed at Oodnadatta — ‘Aboriginal Police Wardens’ were used in an unofficial capacity during that era and probably much earlier as can be noted from the use of Aboriginal ‘trackers’ during the early colonial period of SA; the Police Aide scheme was introduced when I was the senior sergeant in charge of Marla in 1984; see also Appendix 1 of this thesis, Figures A 1.7, A1.11.

²⁵ Ibid 22 [2].

be stationed at various communities throughout the Lands.²⁶ They were to be recruited from within their own communities. The objectives of the program included:

- Improved police/Aboriginal relations;
- Improved quality and appropriateness of police service to the Pitjantjatjara Lands
- Provide police with a better cultural, social and geographic knowledge of the area
- Development of an increased mutual understanding between police and Aboriginal people
- Prevent the need for having police officers based permanently on the Lands
- Enable Aboriginal people to develop responsibility for managing their own problems²⁷

Successful community policing depends upon good relations being established between a community and the police. In theory, Community Constables might be used to improve relations with a close association with both their communities and their police employers. However, as discussed further below, reliance on Aboriginal community members acting as ‘go-betweens’ for the police can be problematic due to cultural conflicts Community Constables experience.

The penultimate bullet-point, ‘prevent the need for having police based permanently on the Lands’, was justified by SAPOL on the basis that there was insufficient work on the Lands and a lack of ‘adequately skilled and motivated’ officers. There was also recognition of the ‘concept of “self-determination” (described as Aboriginal people self-governing their own communities).’²⁸ One way of reading this reference to self-determination is as an acknowledgement of a degree of legal pluralism operating in the lands. This is reflected in the following SAPOL observation:

This [the fact that Community Constables play a key role in resolving disputes before they become confrontational or violent] is particularly evident in relation to inter family

²⁶ Ibid 5; see also *Police Act 1998* (SA) s 24, the statutory authority for the Commissioner of Police to appoint Community Constables.

²⁷ SAPOL, above n 13, 5 [2].

²⁸ Ibid 9 [4.5].

disputes, whereby it is often appropriate to let those involved settle their own issues according to their cultural norms.²⁹

This recognition of cultural differences in resolving inter-family disputes could be extended to other areas of policing on the Lands, providing a means by which legal pluralism could prove to be an effective adjunct to current policing practices, relieving Anangu from being in the position of requiring ‘much faith in the benevolence of government.’³⁰ There was judicial support for promoting self-determination on the Lands in *Gerhardy v Brown*.³¹ Brennan J stated that the purpose of the APY Land Rights Act was: ‘restoration to the Pitjantjatjaras of the *use and management* of the lands ... and discharge the *traditional responsibilities* to which they are subject in respect of the lands.’³² This will be discussed in more detail in chapter 6.

1 Statutory Powers — Community Constables

An examination of the two different forms of the oaths of office of a Community Constable and a sworn police officer reveals that Community Constables have limited or no statutory powers and working only at the behest of their SAPOL supervisors.³³ The powers, responsibilities and immunities of Community Constables are subject to limitations imposed by the Commissioner of Police.³⁴ They are not subject to the normal probationary period applicable to other sworn police officers.³⁵ Community Constables are paid wages according to an Enterprise Agreement.³⁶ However, being recruited from their home communities within the Lands, they do not receive the same generous allowances as the ‘Hard to Fill’ positions for sworn officers as noted in Figure 4.3.³⁷ They are issued with khaki uniforms and, instead of firearms, ‘carry the

²⁹ Ibid 5, 9 [4.6].

³⁰ Julie Evans et al (eds), *Sovereignty: Frontiers of Possibility* (University of Hawaii Press, 2013)13, 166.

³¹ (1985) 159 CLR 70.

³² *Gerhardy v Brown* (1985) 159 CLR 70, 136 (Brennan J) (emphasis added).

³³ *Police Regulations 2014* (SA) sch 3, cl 1–2.

³⁴ Police Act 1998 (SA) s 30.

³⁵ Ibid s 27(7)(d).

³⁶ Industrial Relations Commission, ‘South Australia Police Enterprise Agreement 2011: File No. 6285 of 2013, Cross Reference File No. 1983/2011. Variation Orders made Pursuant to Section 84 on 14/1/2014’ (14 January 2014) <<http://www.industrialcourt.sa.gov.au/index.cfm?objectid=F61027BD-C936-81D5-BD12239283ED4465>> sch 1.1; Annual wages vary from \$51,500 to \$67,465, depending on their experience and pay band.

³⁷ Ibid cl 2.1.3.

operational equipment of defensive spray, baton and handcuffs whilst on duty.’³⁸ These members are referred to as ‘Traditional Community Constables’ compared with ‘Urban Community Constables’ employed in southern regions of the State. The SAPOL document states that ‘[i]n reality, Traditional CCs have made slower progress [in] acquiring knowledge and skill levels in comparison [with] Urban CCs. The reason for this slow progress appears to include issues such as limited educational opportunities, cultural alignment and community pressure.’³⁹

The official duties of a Community Constable are contained within a SAPOL Position Information Document (PID).⁴⁰ Their duties are divided into two key roles, liaison between police and communities, and the use of their cultural knowledge to assist police in implementing appropriate policing strategies.⁴¹ Although the initial PID provided Community Constables with the power of arrest, this was removed as a result of the Community Constable program evaluation and options of June 2011.⁴² Their revised duties were in supporting police as translators, in negotiating the resolution of community disputes, and in providing sworn officers with training relating to culturally sensitive issues.⁴³ Unlike their earlier functions, their revised duties do not include having the power of arrest or to undertake first response duties.⁴⁴

It is unclear whether these 2011 recommendations have been adopted by SAPOL management, but it appears they were not as of June 2012.⁴⁵ It does, however, indicate there are operational concerns regarding Community Constables holding powers of arrest, making it clear that ‘CCs are not employed as police officers and do not receive the same high level of training [as other SAPOL officers]’.⁴⁶

The major difference between the original Warden system and the Community Constable scheme is that Wardens only performed a liaison role, while Community

³⁸ SAPOL, above n 13, 13 [5.1.3].

³⁹ Ibid 12; for the sake of simplicity, this thesis refers to Traditional CCs as Community Constables.

⁴⁰ Ibid 24, Appendix B Position Information Document (PID) 881A Traditional Community Constable.

⁴¹ Ibid 15, option 13.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ The Anangu Lands Paper Tracker, *Anangu Lands: recruiting Community Constables* The Anangu Lands Paper Tracker <http://www.papertracker.com.au/archived/anangu-lands-recruiting-community-constables/#_edn57>.

⁴⁶ SAPOL, above n 13, 14 [5.2].

Constables have a joint role of liaison and assisting with the development of culturally appropriate police strategies. This suggests that SAPOL is at least cognisant of the importance of culturally appropriate policing, even if they have not managed to effectively implement such strategies. This will be discussed further in this chapter and in chapter 6.

2 *Community Constable Recruitment and Training*

SAPOL has experienced difficulties in recruiting and retaining suitable Anangu to the Community Constable program, resulting in only four persons actually being appointed as of 2015.⁴⁷ Their training is basic, consisting of ‘a few days’ spent on the Lands with a supervisor, a three-day Police Academy course, followed by 12 months of supervised activities on the Lands.⁴⁸ In 2009, the SA Police Minister explained that poor recruit numbers were a result of ‘very few Anangu meet[ing] the selection criteria to be community constables, often because of medical grounds, a lack of education or a criminal history.’⁴⁹ In 2014, SAPOL stated that ‘Community Constables continued to play a pivotal role in serving the APY Lands by working with police officers’,⁵⁰ yet in 2015, they revealed that ‘there is no specific drive to recruit ... [but] if Anangu are interested in becoming a Community Constable they should visit the SAPOL “achieve more” website or speak to a police officer at their local police station’.⁵¹

Because of low recruit numbers, a new Police Aboriginal Liaison Officers (PALO) program was trialled in 2008, with four local Anangu women employed at Amata, Indulkana and Ernabella.⁵² The 12-month trial was funded from the Community

⁴⁷ Nerida Saunders, ‘South Australian Government Update: Progress on the Anangu Pitjantjatjara Yankunytjatjara (APY) Lands - Service Delivery and Development’ (Department of the Premier and Cabinet Aboriginal Affairs and Reconciliation Division, December 2013); *ibid* 6; it is believed these Community Constables numbers have remained static since 2013; see also SAPOL, above n 13, 17; latest numbers of CCs has been obtained from the Anangu Lands Paper Tracker, Update on APY Community Constables’, 4 February 2016 <<http://www.papertracker.com.au/2016/02/update-on-apy-community-constables/>>.

⁴⁸ See, eg, 101.5fm Radio Adelaide Digital, 19 October 2015 Paper Tracker, Interview with SAPOL Inspector Ian Humby <<https://radio.adelaide.edu.au/sapols-new-apy-community-constables/>>.

⁴⁹ ABC News, Community constable shortage frustrates APY Board, 15 September 2009 <<http://www.abc.net.au/news/2009-09-15/community-constable-shortage-frustrates-apy-board/1429640>>.

⁵⁰ Nerida Saunders, ‘South Australian Government Update: Progress on the Anangu Pitjantjatjara Yankunytjatjara (APY Lands) – 2014 Annual Report’ – Service Delivery and Development (Department of the Premier and Cabinet Aboriginal Affairs and Reconciliation Division, January to December 2014) 1.

⁵¹ 101.5fm Radio Adelaide Digital, above n 48.

⁵² SAPOL, above n 13, 17 [6].

Constable budget.⁵³ PALOs were employed as casual employees by SAPOL and their role explained as being civilian Aboriginal personnel employed to:

act as a bridge between local police and the community on the APY Lands ... [their role] is one of community engagement and liaison, and to establish and maintain positive rapport between the APY community and SAPOL ... [they have no role] in law enforcement, arrest or acting as first response to an incident ... [and] do not carry accoutrements or have 'use of force' powers beyond that of an ordinary citizen.'⁵⁴

Other than being employed by SAPOL, the original PALO role of community engagement and liaison is similar to that of the Warden system. While PALOs do not have a role in developing culturally appropriate police strategies like Community Constables, there is little intrinsic difference in roles of Wardens, Community Constables and PALOs. However, these programs are all strongly suggestive of SAPOL's awareness of the importance of culturally appropriate policing strategies.

Between December 2009 and February 2011, only one PALO was employed on the lands.⁵⁵ As of 2013, three PALOs were employed.⁵⁶ However, as with Community Constables, SAPOL are also experiencing difficulties recruiting candidates for the PALO positions who have the required skills and who are willing to work on a casual basis.⁵⁷ A 2011 SAPOL evaluation of the PALO program identified several reasons for its lack of success. The reasons included that there were no standard operating procedures or other form of instructions available to APY SAPOL police regarding PALO duties; there were no set working hours with PALOs being 'essentially "on call" and can be recalled up to 20 hours per week or 40 hours per fortnight';⁵⁸ and that their duties appeared to be those of providing 'clerical support (office duties) to police officers.'⁵⁹ It appears PALOs were not being employed with their original liaison and community engagement role in mind.

⁵³ Ibid 19 [8.2].

⁵⁴ Ibid 17 [6].

⁵⁵ Ibid 19 [8.3].

⁵⁶ Saunders, above n 47; the PALO program commenced in 2008.

⁵⁷ SAPOL, above n 13, 19 [8.3].

⁵⁸ Ibid 18–19 [8.1]; 'recalled' is a situation where a person can be asked to return to duties at times other than during their normal hours of duty.

⁵⁹ Ibid.

As a result of this evaluation, it was recommended that PALOs would initially ‘[p]rovide support to police as translators; provide general support to police within the police stations; [and] provide sworn members with knowledge relating to culturally sensitive issues.’⁶⁰ Part of these recommendations included the suggestion that the PALO scheme be seen as a means of suitable persons transitioning to the position of Community Constable, but not automatically so. It was also recommended that their employment be changed from an “on call, contracted by police as required” position, to now being employed in a supervised fashion.’⁶¹ It took SAPOL two years to recognise that no official duties-guiding documentation existed. SAPOL reported that ‘[a]necdotal comment from sworn members on the APY Lands suggests that the working conditions of PALO’s provide a barrier to employment and retention.’⁶²

D Community Safety Programs

In October 2015, as a result of poor PALO recruitment, a Community Safety Program, also known as ‘night patrols’, was trialled on the Lands. This was an individual community initiative involving Anangu volunteers who liaise with Community Constables and SAPOL members where appropriate.⁶³ The aim is one of community safety, collecting children wandering about the communities at night. A similar night patrol program was previously in operation from 2004, under the direct supervision of SAPOL, but it proved to be unsuccessful and was abandoned in 2006.⁶⁴ The reasons for the lack of success, according to the Mullighan Report, were the questionable reliability of community members; that police did not participate in the patrols; and that ‘[e]nthusiasm waned as the communities or individuals were not able to organise themselves.’⁶⁵ Moreover, ‘there was misuse of vehicles, which repeatedly were used for private purposes.’⁶⁶ Police also reported that ‘[t]he reality is that there was little

⁶⁰ Ibid 21 [Option 2].

⁶¹ Ibid.

⁶² Ibid 19 [8.3].

⁶³ Anangu Lands Paper Tracker, Update on APY Community Constables, 4 February 2016 <<http://www.papertracker.com.au/2016/02/update-on-apy-community-constables/>>.

⁶⁴ Mullighan, above n 19, 237–8.

⁶⁵ Ibid 237.

⁶⁶ Ibid.

evidence, none documented, which identifies any value that came to communities by reason of their [the night patrols] existence.’⁶⁷ Police further advised that:

it did not seek to remove itself from responsibility to make the programs work but expressed the view that the programs cannot work without the ongoing commitment and participation of the communities but in any event there is a need for full time management. One senior officer said the patrols had ‘... some merit. However, I don't think it's a policing issue as such.’⁶⁸

The failure of this original program was not the result of the service not being required. What it does demonstrate is the difficulty police have with engaging in culturally appropriate policing in the Lands. From a policing perspective, it is much easier to treat policing the APY Lands in the same manner as they do in any other cultural context. From the perspective of Community Constables, it is very difficult to play a liaison role and develop culturally appropriate policing practices within a culture of policing that is resistant to these roles.

Despite the abandonment of the program, the Mullighan Inquiry was told that the ‘APY supports the reintroduction of “good quality night patrols”. It is suggested that perhaps they would succeed with police presence during the patrols at least in the early stages.’⁶⁹ It is difficult to understand why police did not participate in the original night patrols given community concerns about ‘behaviours that constituted a problem for the community and [the need to] afford protection to community members.’⁷⁰ As mentioned, the program was reintroduced in late 2015 but its effectiveness is unknown. Its strength, however, lies with it being a community initiative rather than a product of official policing.

While comparable Aboriginal community-based night patrols have been successful in country New South Wales and other jurisdictions,⁷¹ the APY Lands communities are

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Ibid 238.

⁷⁰ Ibid 237.

⁷¹ See generally Amanda Porter, *Decolonising Juvenile Justice: Aboriginal Patrols, Safety and the Policing of Indigenous Communities* (PhD Thesis, University of Sydney, 2014).

home to more traditionally-oriented Aboriginal people compared with those in New South Wales.

SAPOL has recognised the importance of Pitjantjatjara/Yankunytjatjara-specific issues relating to cultural obligations and the additional problems of general community pressure.⁷² These issues are closely related to power-sharing/authority and avoidance relationships.

(a) *Cultural obligations*

The principle of reciprocity (*ngapartji ngapartji* — in turn, in turn) is an essential component of Anangu culture, one that is often misunderstood by non-Aboriginal people. Reciprocity can take on many forms and may, for example, be expressed in ceremonies focused on increasing the necessities of life: ‘Being hunters and gatherers, they had no immediate control over food supplies through planting and herding ... Rituals are performed to ensure the continued supply of food species and other materials required to sustain life.’⁷³ Their performance by other totemic groups contributes to the well-being of the whole community.⁷⁴

In Western societies, prominence is given to individual rights and responsibilities. In Aboriginal societies, emphasis centres on the group which is seen as being responsible for an individual’s behaviour and it is the offender’s ‘group as a whole, or another member of the group [who] is punished for the offence.’⁷⁵ Reciprocity can be quite subtle and even extends to the sharing of knowledge, the exchange of goods and the production and sharing of food.⁷⁶ Reciprocity is part of *Tjukurpa* (Anangu Dreaming), a ‘body of rules, beliefs, and ceremonies which are required to be followed in order to satisfy a complex web of obligations binding upon living Aborigines by virtue of a body of precedent laid down in a transcendental past.’⁷⁷ Bill Edwards points out that the

⁷² See eg, SAPOL, above n 13, 12 [5.1.2]; see also Garth Nettheim, ‘Summary Jurisdiction on the Pitjantjatjara Lands’ (1990) 2(45) *Aboriginal Law Bulletin* 4, 5 regarding Police Aides being affected by kinship considerations.

⁷³ W H Edwards, *An Introduction to Aboriginal Societies* (Social Science Press, 2nd ed, 2004) 84.

⁷⁴ *Ibid.*

⁷⁵ *Ibid* 73.

⁷⁶ *Ibid* 61.

⁷⁷ Aboriginal Customary Law Committee, ‘Preliminary Report of the Aboriginal Customary Law Committee’ (Adelaide, September 1979) <<http://www3.austlii.edu.au/au/other/IndigLRes/1979/7.pdf>>, 16.

principles of reciprocity are also expected of non-Aboriginal interactions with Anangu, resulting in ‘misunderstanding in White/Aboriginal relations.’ Edwards further explains that ‘[w]hites have been quick to judge Aborigines for failing to meet obligations when from the Aboriginal point of view, it has been the whites who have lacked a sense of responsibility.’⁷⁸

(b) *Traditional authority*

Authority as we know it from a Western perspective is unknown in traditional Pitjantjatjara society. Anangu societies are acephalous. There are no tribal or language group heads or chiefs acting as community-appointed leaders.⁷⁹ While certain senior men and women have totemic authority regarding kinship relationships, ‘the whole community is trustee for authority legitimised and created in the heroic times of the Dreaming. Thus, the whole of the society sits in judgement on individual members, ensuring that what happens is in accordance with customs.’⁸⁰ Generally:

social control is a matter of relatives controlling relatives, since it is a matter of a family self-interest not to let a situation get out of hand. This is a fundamental reality in a society which categorically requires certain relatives to support kinsmen in a fight regardless of the question of right or wrong.⁸¹

Community Constables are faced with a very real problem in exercising their authority when policing in Anangu communities. In Anangu society, ‘[e]ach person is autonomous, inviolate, and sovereign.’⁸² If a Community Constable were to ‘denigrate, publicly challenge, or to lay hold of another either directly or through kinsmen, [it would] constitute an offence for which serious consequences will almost certainly follow ... [and] it is preferable to have an outsider do it because it avoids community polarisation and the spread of disputation.’⁸³

⁷⁸ Edwards, above n 73, 73.

⁷⁹ Ibid 53.

⁸⁰ Aboriginal Customary Law Committee, above n 77, 24–28.

⁸¹ Ibid 27.

⁸² D Hope, *Aboriginal Policing in South Australia: The problem and the potential* (The Australian & New Zealand Association for the Advancement of Science, 1985, 4.

⁸³ Ibid.

(c) *Avoidance relationships*

Avoidance relationships play an important role in Aboriginal societies. As Edwards explains, in most Western nuclear families, possible conflicts with parents-in-laws are reduced by limited interaction.⁸⁴ In smaller, traditionally-oriented communities, where there is closer contact between most members, there is an increased risk of problems and conflict, one that is culturally resolved by forbidding or limiting contact ‘between, for example, a man and his mother-in-law or a man and his father-in-law’.⁸⁵

Given these important and often nuanced cultural factors, the failures of the Community Constable and PALO programs is unsurprising, especially when considering that persons so appointed all have close familial and cultural ties within communities under their watch.⁸⁶ The failure of the earlier Aboriginal Police Warden system came about for similar reasons,⁸⁷ and as discussed above, there are no intrinsic differences between the earlier Wardens and the later Police Aides, Community Constables and now PALOs. When viewed objectively and historically, all have been problematic, casting doubt on their future value. Furthermore, it would seem the lessons of the past have been ignored when the results of my 2016 interviews found that the majority of participants preferred Anangu to be trained ‘as proper police’ and not simply as Community Constables (see Figure 4.2).

⁸⁴ Edwards, above n 73, 61.

⁸⁵ Ibid 68; see also Chivell, above n 14, [11.61].

⁸⁶ Personal experience with these programs while stationed at Oodnadatta and Marla.

⁸⁷ Richardson, above n 1.

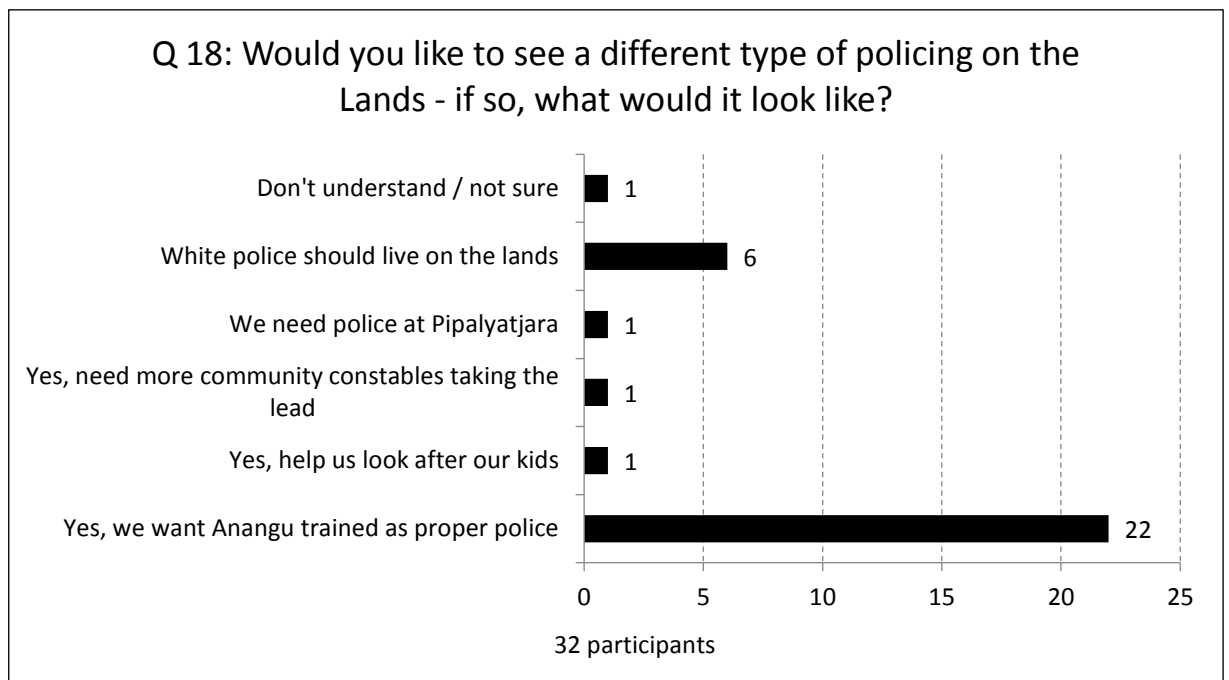


Figure 4.2 — 2016 survey question 18, APY Anangu

At first glance these results seem inconsistent with the previously discussed cultural aversion of Anangu exercising authority over another. However, discussions with senior *Tjilpis* during the 2016 surveys indicated that Anangu would be prepared to accept the authority of Anangu police who are trained SAPOL members, acting within their statutory authority.

The use of local Aboriginal people to assist in policing remote Aboriginal communities has not been restricted to SA. For example, Western Australia Police had used ‘Aboriginal police liaison officers ... as quasi-police officers’ — these and police aides were ‘phased out a decade ago’, and now replaced by Aboriginal Community Relations Officers (CROs).⁸⁸ The primary role of CROs is seen as ‘breaking down perceived barriers between the Aboriginal community and police officers ... CROs are also required to educate new police officers about local Indigenous customs and places.’⁸⁹ Like APY Community Constables, CROs are not police officers.⁹⁰ There appears to be

⁸⁸ Natalie Jones, ‘Aboriginal community relations officer program could be rolled out across WA: Police Minister Liza Harvey’ (14 June 2015) *ABC Online* <<http://mobile.abc.net.au/news/2015-06-14/wa-aboriginal-police-trial-could-be-expanded/6542438>>.

⁸⁹ Ibid.

⁹⁰ Ibid.

no difference between the roles of the Western Australian CROs and the South Australian PALOs (or indeed Community Constables).

It is noted that many decisions about policing the APY Lands, particularly during the early 1980s, were the result of relatively short field trips by senior police management teams, many of whom had limited (if any) coalface experience of policing in the Lands.⁹¹ Direct contact and interviews with local operational police by senior management involved in these studies was minimal.⁹² It was my experience that while front line officers can provide current policing activity information to such investigating teams, their attention to often urgent daily duties prevent them from being in a position to consider past police or government policy failures or successes.⁹³ Given this lack of localised policing knowledge in the development of the Community Constable and PALO programs, it is unsurprising those programs have not been as successful as they could have been. This thesis argues that such programs should not be abandoned, but need to be implemented more effectively in the future. This is discussed further in chapter 6.

III APY POLICING ISSUES

A *Staffing Remote Police Stations*

For decades, SAPOL has experienced difficulties in attracting suitable sworn officers to remote postings, particularly those involving the APY Lands.⁹⁴ During my police career from 1965 to 1989, officers stationed at remote country police stations were required to reside in police housing, which, despite being available for cheap rental, were often of poor quality. Remote postings were limited to a minimum of two and a maximum of three years, and local schooling was often substandard. Recreational facilities were minimal. Remoteness, harsh weather and poor road conditions were

⁹¹ Richardson, above n 1, 5.

⁹² As the officer in charge at Marla at that time, neither I nor any of my subordinate officers were approached for comment by senior police management about the then proposed Police Aide program.

⁹³ It is certainly a factor that I was unaware of during my policing of the APY Lands, only becoming clear to me during my later tertiary studies.

⁹⁴ See, eg, Mark Carroll, 'Policing the APY Lands' (2007) (April) *South Australian Police Journal* 8, 8–9; see also Jenny Fleming and Rick Sarre, 'Policing the NPY Lands - The Cross-Border Justice Project' (Winter 2011) 3(1) *Australasian Policing* 21, 23; personal experience from my own police postings to the north of SA.

factors many officers and their families found unattractive. However, it was my experience that remote area postings were attractive to officers who were self-motivated. Those having a genuine vocational desire to engage with Aboriginal legal issues sought out postings involving the APY Lands. Unfortunately, because of their remoteness, there was also a danger of such postings being used as a means of dealing with difficult officers. Although the reasons for such decisions are not documented, I was aware of these factors during my posts to Oodnadatta and Marla.

Despite Anangu desiring a permanent police presence on the Lands,⁹⁵ it was not until 2010 when new police stations were built at Mimili, Ernabella and Amata that reasonable housing facilities became available for officers. However, as reported to me in 2015 during casual conversations with the former officer in charge of the Marla police station, SAPOL was unable to attract married officers and their families to the Lands. Reasons given were the lack of family-oriented housing, which was located within the police station compounds and surrounded by tall security fencing.⁹⁶ The Lands were also alcohol-free, there was a lack of recreational facilities, a lack of high-quality schooling and minimal employment opportunities for spouses. In any event, as will be discussed, in 2008, SAPOL had adopted a FIFO policing arrangement for the Lands, one which precluded officers' families.

B APY Lands Police Recruiting Incentives

Evidence of SAPOL's difficulties in attracting members to APY Lands postings is demonstrated in the SA Police Enterprise Agreement,⁹⁷ shown in Figure 4.3:

Level 2 AP Lands	Amount (from 1/7/2013)
Loading (on top of normal wages) of 45% (encompasses shift and weekend penalties, overtime, on call and recall)	
Rent-free housing	
Reimbursement of disconnection and reconnection of utility services and mail redirection upon initial relocation	\$130
Reimbursement of storage expenses for furniture, household effects and vehicles (per annum)	\$3,190

⁹⁵ Richardson, above n 1,7–8.

⁹⁶ See Appendix 1, Figures A1.13–14.

⁹⁷ Industrial Relations Commission, above n 36.

Level 2 AP Lands	Amount (from 1/7/2013)
Water, electricity and gas usage paid by SAPOL	\$5,190
Payment of freight of foodstuffs (up to a maximum weight of 100 kilograms per month for member with dependents)	\$1,420
Remote Allowance (paid at completion of each year of service)	\$4,010
Provision of satellite television (eg Foxtell) service where practicable	\$860
Lifestyle payment (formerly negotiable component) paid at the commencement of and for each year of service	\$6,480
Additional 40 hours (5 working days) of annual leave (referred to as Special Annual Leave) to be incorporated into the roster to facilitate extended time off for recreational purposes	
Use of [police] plane at least monthly where available for respite purposes from AP Lands to Adelaide	
Guaranteed posting to metropolitan LSA ⁹⁸ of member's choice at completion of tenure. Where a member does not wish to be posted to a metropolitan LSA, any other posting of the member's choice subject to the discretion and approval of Manager, HRMB, based on organisational requirements.	

Figure 4.3 — APY Lands Police Allowances.⁹⁹

When I was stationed at Oodnadatta in the late 1970s and later at Marla in the mid-1980s, the only incentive for remote postings was two extra days of annual leave to account for the remoteness of those postings — but this extra leave could only be claimed if travelling to Adelaide during annual leave.

The incentives listed in Figure 4.3 are of a high order. Calculations reveal that a typical Senior Constable First Class level 5 posted to the Lands may receive an annual income of approximately \$144 395 — not including taxation benefits — compared to a base rate of approximately \$80 559 if stationed in Adelaide. The Senior Sergeant in charge of the APY Lands would, given these allowances, earn over \$200 000 annually.

Although I was unable to interview APY SAPOL members, an important question raised by such incentives is whether members are attracted to the Lands for financial reward rather than vocational reasons. Just how dedicated are officers working on the Lands to the delivery of an effective, efficient, pro-active and culturally aware police service to the Lands' communities? Because APY Lands police recruitment has been problematic for SAPOL, FIFO policing was initiated in 2008.

⁹⁸ Local Service Area.

⁹⁹ Industrial Relations Commission, above n 36, cl 35 — the APY Lands posts are designated as being 'hard to fill' — rates applicable to AP and Yalata Lands, see sch 3, level 2.

C FIFO Policing

The current FIFO arrangement for police officers engaged in APY policing, where officers work on a three-week rotation of two weeks on and one week off, has been operational since August 2008.¹⁰⁰ FIFO policing make it possible to rotate more police and thereby maintain a presence on the Lands that is non-permanent but numerically stronger than previous policing from Marla. However, given the evidence in this chapter, this thesis argues that FIFO policing exacerbates the culture of alienation between Anangu and police.

FIFO operations are not a completely new approach to policing as will be noted from the previous explanation about Oodnadatta police operating in a similar manner from 1976 to 1984. The Oodnadatta FIFO operation ceased when the police station at Marla was opened and members from that station conducted weekly road patrols, still utilising the police stations at Indulkana, Ernabella, Amata, and a new office at Fregon built in about 1985. While it could be argued that there is no difference between the current FIFO operations and that of earlier Oodnadatta patrols, it is suggested that officers at Oodnadatta were residents within the overall police district which included the APY Lands. Officers saw themselves as part of a larger community despite the vast distances involved.¹⁰¹ Current FIFO officers all, apparently, reside well outside the region and could hardly consider themselves, or be considered, as APY Lands local residents as shown in the following graph:

¹⁰⁰ Government of South Australia, 'Implementation Statement to the Mulligan Commission on Sexual Abuse of Children on the APY Lands' (2008) response to recommendation 38, 63.

¹⁰¹ While stationed at Oodnadatta it was not uncommon for the two married officers to spend recreational time off duty with their families in various APY Lands communities.

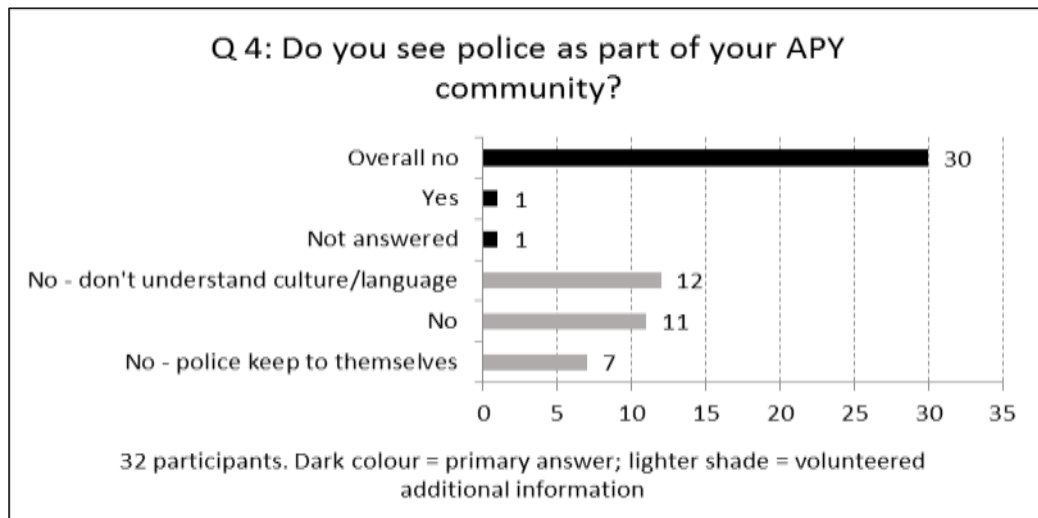


Figure 4.4 — 2016 survey question 4, APY Anangu

The same survey found that the majority of those surveyed were dissatisfied with FIFO police operations:

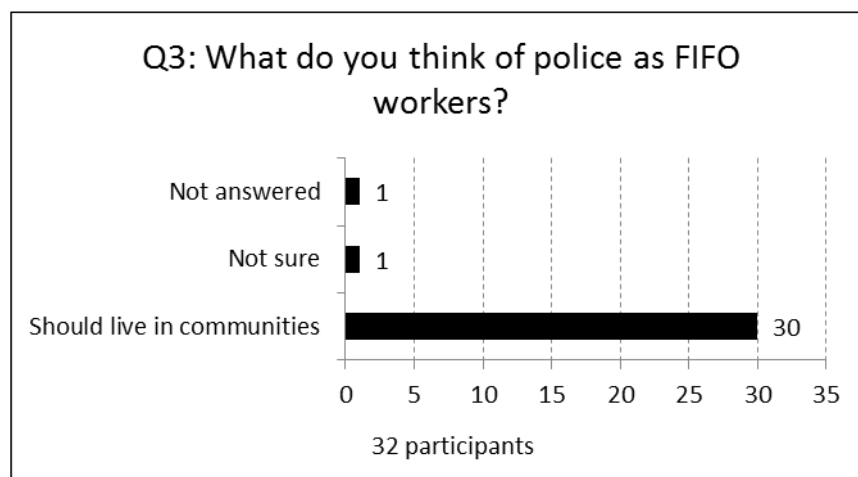


Figure 4.5 — 2016 survey Question 3, APY Anangu

Although not shown in these two graphs, those who were dissatisfied all mentioned that if police had to be stationed on the Lands, they would prefer to see them living there with their families. Their preferred option, however, is for ‘properly trained Anangu officers’ – see Figure 4.2.

The lack of provisions for non-police partners or family members, including the inability to reside together as a family, combined with lack of employment options, decent schooling and a general absence of suitable recreational and other facilities, places the police who are accommodated on the Lands at a significant disadvantage

compared with married officers in other locations, particularly in terms of their ability to integrate into the local community. While it is understandable that police are required to take their professional role seriously, it cannot be said that the presence of family would be a distraction; for the family unit would serve as both enhancement and inducement through exposing them to the full realities of life in the Lands. As it presently stands, police remain insulated/isolated from Anangu communities and Anangu culture.

Permanency is another interesting aspect of APY FIFO policing. In an article describing the career of Detective Brevet Sergeant Buck, he is described as undertaking a ‘*permanent opportunity*’ on the Lands for a posting period of ‘almost 18 months on a fly-in/fly-out arrangement’.¹⁰² This short period of permanency contrasts with, for example, the current officer in charge of Marla’s posting of five years, whose living and working conditions are claimed to be just as remote and arduous as postings within the Lands.¹⁰³ It must nevertheless be acknowledged that SAPOL face challenges in recruiting suitable officers to the Lands without offering strong incentives, which are predominantly financial in nature.¹⁰⁴ There needs to be an acknowledgement that such incentives can lead to officers motivated by financial rewards rather than a commitment to remote policing in Aboriginal communities applying for work in the Lands.

In 2005, the then Deputy Commissioner of Police, John White, advised the Coroner that ‘fully sworn police officers on the Lands has enabled police to provide a better response capability and also to allow for more time for community liaison and crime prevention initiatives.’¹⁰⁵ A 2011 SAPOL evaluation of the Community Constable scheme, and APY Land’s policing in general, identified that ‘[r]esponse times and accessibility to policing services are pointers to quality service delivery.’¹⁰⁶ The 2008 Mullighan Report also states that ‘police presence on the Lands must be readily available to each of the communities.’¹⁰⁷ When viewed against the empirical data obtained during the 2016 interviews with Anangu, the obvious dissatisfaction with the current policing

¹⁰² Matthew Buck, ‘The Colourful Character of APY: Policing the APY Lands’ (2012) 25(2) (Autumn 2012) *National Emergency Response Journal* 18 120 — emphasis added.

¹⁰³ Casual conversation with the officer in charge of Marla during a visit to the Lands in March 2015.

¹⁰⁴ See Fleming and Sarre, above n 94, 23.

¹⁰⁵ Chivell, above n 14, [11.21].

¹⁰⁶ SAPOL, above n 13, 7 [4.2].

¹⁰⁷ Mullighan, above n 19, 244.

service reveals that these ideals are not being delivered, a matter that will be explored further in chapter 6.

D *Police Stations in the APY Lands*

The need for policing the APY Lands has been long-recognised. In the 1970s, SAPOL stated that ‘the extra resources [for regular weekly patrols by aircraft and road from Oodnadatta] were provided with the stated aim of assisting the welfare and advancement of the Aboriginal population, and were not provided on the basis of increased workload.’¹⁰⁸ Since the introduction of the Police Aide program in 1986, SAPOL officers have been stationed within the lands. Because of increasing crime, Anangu have demanded improved policing from that time.¹⁰⁹ Based on recommendations in the 2008 Mullighan Report, it was decided that a permanent police presence was required on the Lands.¹¹⁰ In 2010, new police stations were officially opened at Amata, Ernabella and Mimili. The original plans included housing facilities to enable APY officers to be accompanied by their families,¹¹¹ but this never occurred.

The new police stations included a courthouse building within the compound. Given the importance of the separation of the judiciary from the executive branches of government, it seems incongruous that police facilities should also include a courthouse, particularly where police act not only as enforcement officers but also as prosecutors. It was also a matter raised with concern by the Mullighan Report where recommendation 45 makes it clear that APY Lands courthouses should not be part of police stations in order to maintain a separation of powers.¹¹² Accordingly, the Courts Administration Authority does not use the police station courthouses for the APY Court circuit.

Each Lands’ police complexes are of similar design and surrounded by non-climbable 2.5 metre metal security fencing, which can only be described as fortress-like and not at all welcoming in appearance.¹¹³ No doubt there are concerns about security of police premises and issues relating to occupational health and safety, but their appearance

¹⁰⁸ Richardson, above n 1, 7.

¹⁰⁹ Ibid 8.

¹¹⁰ Mullighan, above n 19, pt v, 242–48.

¹¹¹ Ibid 244–5.

¹¹² Ibid 253.

¹¹³ See Appendix 1, Figures A1.13–14.

presents a symbolic closed-shop façade, which can be only viewed as another bar to effective access to police services. The fortress-like stations are also emblematic of the cultural divide between police and Anangu. The exception is at Pipalyatjara, where the original Police Aide Station, built in the 1990s, is still in use but not permanently manned.¹¹⁴ However, according to comments from Anangu interviewees at Pipalyatjara, it is rarely used, even when police visit from other APY communities.

In stark contrast to the three APY police stations are those in the neighbouring Western Australian Ngaanyatjarra communities of Warburton and Blackstone to the west of the Lands. These stations are also relatively new but unfenced and include a large lawned area and are welcoming in appearance.¹¹⁵

In the 2008 Mullighan Report an ‘AEW [Aboriginal/Anangu education] worker told the Inquiry that police on the Lands and community councils are not “doing the right job in the communities”. When their assistance is requested they do not arrive at the right place, or at all, on occasions.’¹¹⁶ This comment was received before the completion of the new police stations on the Lands yet during my 2016 surveys of Anangu the majority of interviewees lamented that despite their proximity, access to the usually locked police stations is difficult, requiring telephone rather than personal contact with police. Even when telephone contact is made, it is not unusual for many hours to pass before police attended. Participants at Pipalyatjara revealed that police often take five or six hours or more to respond to calls for assistance and often better service is provided by Western Australian police from Blackstone.¹¹⁷

During my three 2016 research field-visits to the APY Lands, it was observed that Marla and the APY Lands police stations are only open for business between 8.30 am and 5.00 pm, Monday to Friday, indicated by a sign at the front of each station.¹¹⁸ Direct access to the door of each Lands’ police station office is only available during office hours and then only when police are present and available. At this time the tall

¹¹⁴ Ibid Figure A1.15.

¹¹⁵ Ibid Figures A1.18–19.

¹¹⁶ Mullighan, above n 19, 245.

¹¹⁷ WA police at Blackstone, approximately 100 kilometres west of Pipalyatjara, have authority to police the APY Lands under the provisions of the *Cross-border Justice Act 2009* (SA); the nearest SAPOL station to Pipalyatjara is at Amata, 220 kilometres east.

¹¹⁸ See Appendix 1, Figure A1.12.

security gates are unlocked. There are no signs to indicate the absence of police. There is no call-bell available at the locked gate for use in emergencies. Informal discussions with several senior *tjilpis and pampas* at Ernabella revealed that even when police were observed or heard inside stations during and after normal business hours, they seemed reluctant to respond to urgent calls for assistance, forcing people to use the telephone, which is often diverted to Port Augusta or Adelaide police. As mentioned, my research reveals not only a general dissatisfaction with police services on the Lands,¹¹⁹ but given the complaint about poor police accessibility to the State Government's Country Cabinet in 2017,¹²⁰ it appears little has changed since similar dissatisfaction was raised nine years ago by the 2008 Mullighan Report.¹²¹

Telephone access to police stations on the Lands is also fraught with difficulty. As mentioned, even when police are known to be present at police stations, telephone calls are often diverted to Port Augusta or Adelaide police. As reported to me in 2016, difficulties are often encountered by officers from those locations who may be unfamiliar with the APY Lands and the unique Anangu cultural and linguistic issues. Anangu are often faced with their calls being treated as mischievous, a frustrating situation which may have serious ramifications during emergencies. Even when telephone contact is made, it is not unusual for many hours to pass before police attend due to communications problems on the Lands.¹²²

Also problematic is the requirement to transport prisoners who are refused police bail to Coober Pedy which is, for example, 500 kilometres from Ernabella, necessitating the absence of two officers for possibly up to two days.¹²³ Compounding the situation is that officers from each of the community police stations are also responsible for policing outstations and homeland communities widely spread throughout their designated APY districts. It is important that Anangu have access to quality police services, recognised and acknowledged in a submission by SAPOL to the 2008

¹¹⁹ See Figures 4.2, and 4.4–7.

¹²⁰ Government of South Australia, *Country Cabinet: Anangu Pitjantjatjara Yankunytjatjara Lands*, 30 April to 2 May 2017 <<https://yoursay.sa.gov.au/decisions/countrycabinetapylands/about>>3, 18–19.

¹²¹ Mullighan, above n 19, ch 3.

¹²² See Figures 4.6–7.

¹²³ Interview with John Flavel, former officer in charge, Marla police station (telephone interview, 23 September 2017); Flavel reported that the practice of conveying prisoners to Coober Pedy commenced in about 2010 or 2011; see also Government of South Australia, above n 120, 18.

Mullighan Inquiry, ‘that irrespective of distance and isolation, like all other communities, those within the Lands can rightfully expect a policing service of no lesser standard than that provided elsewhere in the State.’¹²⁴ These sentiments were echoed by SAPOL in their 2011 evaluation of the Community Constable program where, ‘[r]esponse times and accessibility to policing services are pointers to quality service delivery.’¹²⁵

Many of these issues were discussed with Anangu interviewees and the following two figures reveal their dissatisfaction regarding contacting police on the Lands:

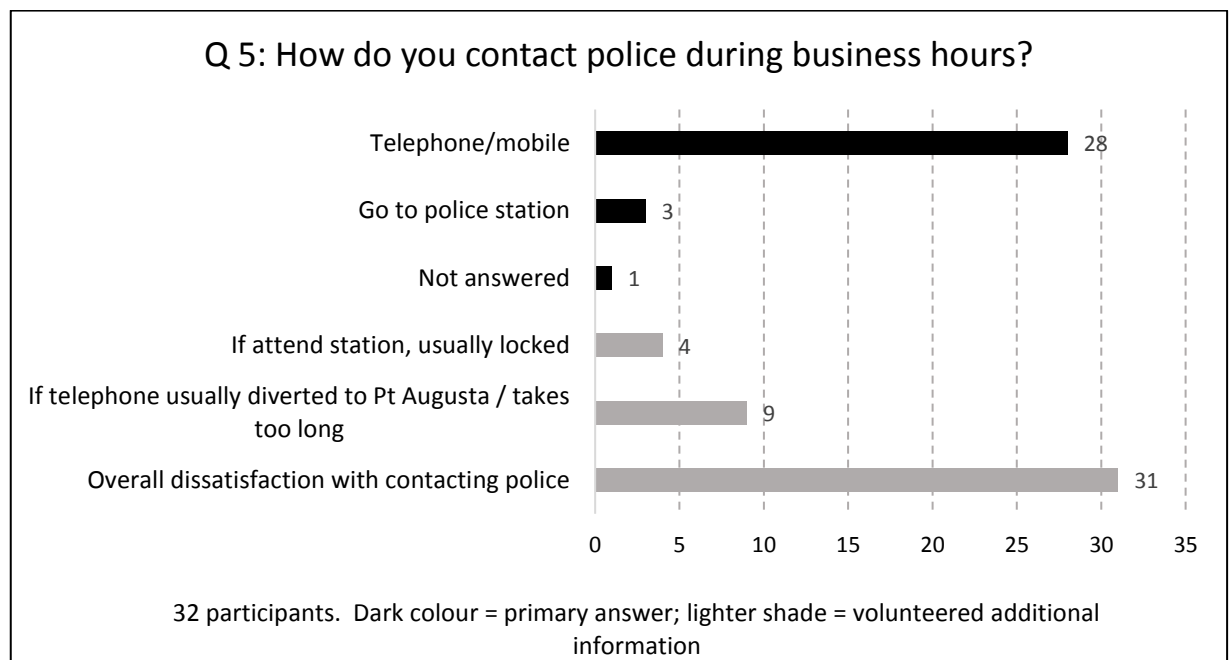


Figure 4.6 — 2016 survey question 5, APY Anangu

At the time of the 2016 interviews, mobile telephone service was only available at Ernabella but, due to local topographical features, its effective range was limited to the immediate environs of the community. In 2017, a new mobile telephone service was opened at Amata, and plans are afoot for similar services to be made available in the near future at Fregon, Mimili and Indulkana. Even so, there still remains the problems of making contact with police. Even after-hours contact is fraught as revealed in Figure 4.7.

¹²⁴ Mullighan, above n 19, 234.

¹²⁵ SAPOL, above n 13, 7.

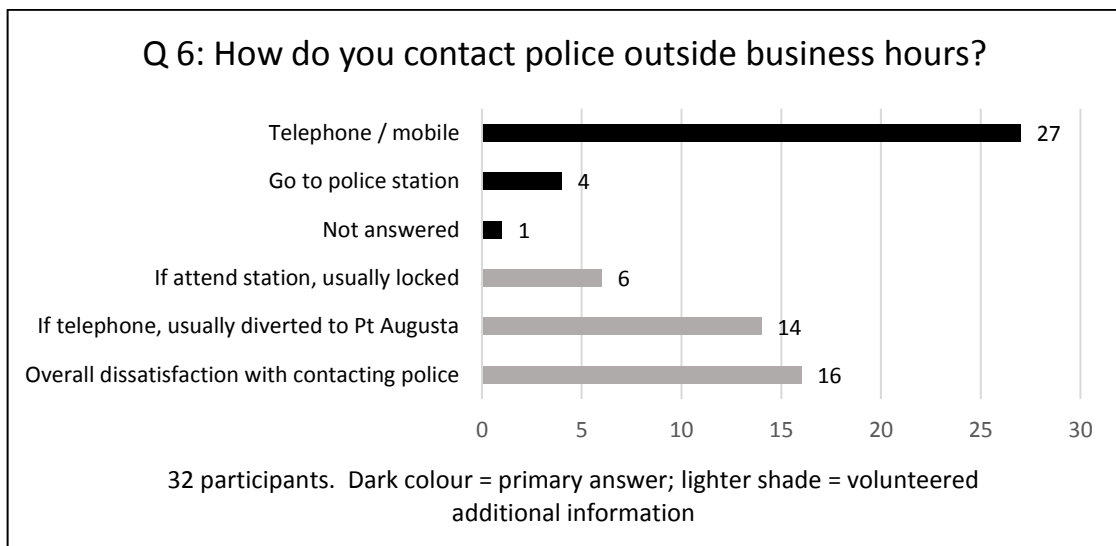


Figure 4.7 — 2016 survey question 5, APY Anangu

During my 25-year police career, which ended in 1989, officers absent from their country police stations were required to display a clearly visible sign near the office door, advising their absence and expected time of return. The police-issued signs were quite large, approximately 60 centimetres wide by 120 centimetres tall, with ‘Police Absent’ printed in large letters. A manually operated clock face and hands allowed the anticipated time of return to be clearly displayed. Additionally, each country police station at which I served was fitted with a call-bell on or near the front door.¹²⁶ As reported by interviewees in 2016, and confirmed by my own visits to the Lands, these facilities were not in use on the Lands.

While there are generally four SAPOL officers based at each of the APY police stations during any roster period, there are times when they will be absent on patrol within their designated police district or involved in after-hours social activities. As mentioned, there is also the requirement that alleged offenders arrested on the Lands who are not given police bail are required to be transported by road to the Coober Pedy police station cells.¹²⁷ However, comments from Anangu interviewees revealed that often, when police are required after hours, they were observed to be present in the station but

¹²⁶ Remote country police stations at which I served during my police career included Cockburn, Oodnadatta, Maree, Leigh Creek and Marla.

¹²⁷ Interview with John Flavel, former officer in charge, Marla police station (telephone interview, 23 September 2017); Flavel reported that the practice of conveying prisoners to Coober Pedy commenced in about 2010 or 2011.

unresponsive to requests for help. As mentioned, the slow response by police adds further to the general dissatisfaction with the police service on the Lands.

The difficulties of being able to contact police at the Lands police stations were raised directly with the State Government during a ‘Country Cabinet’ visit to the APY Lands in late April 2017 — Anangu also requested that new police stations are required at Fregon and Pipalyatjara.¹²⁸ The request was dismissed:

The Police support all of the communities on the APY Lands from the existing Police Stations and there are already enough Police officers on the APY Lands. Sometimes Police have to visit other communities and Police stations might be empty for a few hours. If you need help from Police when they are out of your community, call 131 444 or 000.¹²⁹

However, telephone calls to 131 444 and 000 are answered by a southern call centre and information is then directed to local police. The problem is compounded when local police do not answer, and calls are subsequently diverted to Port Augusta, adding further to delays in police attendance.

IV LANGUAGE AND CULTURE ISSUES

A Introduction

This section examines language and cultural differences between non-Aboriginal APY SAPOL members and local Anangu and explores the extent to which they constitute barriers to effective and efficient policing in the Lands. This thesis contends that the problems identified would be substantially mitigated by a better understanding of Anangu culture and language.

Most Anangu on the Lands speak English as a second or subsequent language,¹³⁰ as revealed in Figure 4.8:

¹²⁸ Government of South Australia, above n 120, 18.

¹²⁹ Government of South Australia, *Country Cabinet: Anangu Pitjantjatjara Yankunytjatjara (APY) Lands, 30 April to 2 May 2017: State Government Response Summary* <<https://yoursay.sa.gov.au/decisions/countrycabinetapylands/about>>.

¹³⁰ The 32 Anangu surveyed represent 1.4 per cent of the Aboriginal population of the APY Lands; see also Chapter 2 of this thesis regarding ABS statistics.

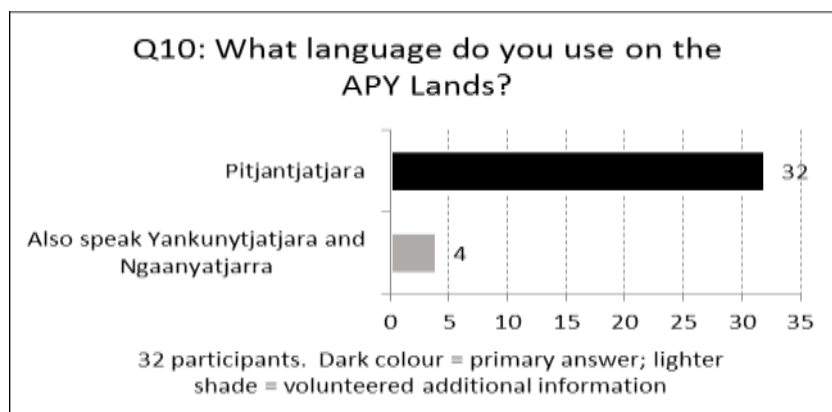


Figure 4.8 — 2016 survey question 10, APY Anangu

Figures 4.9 and 4.10 suggest that SAPOL officers have little understanding of Anangu language and culture, explaining one of the reasons for the overall dissatisfaction with police services.

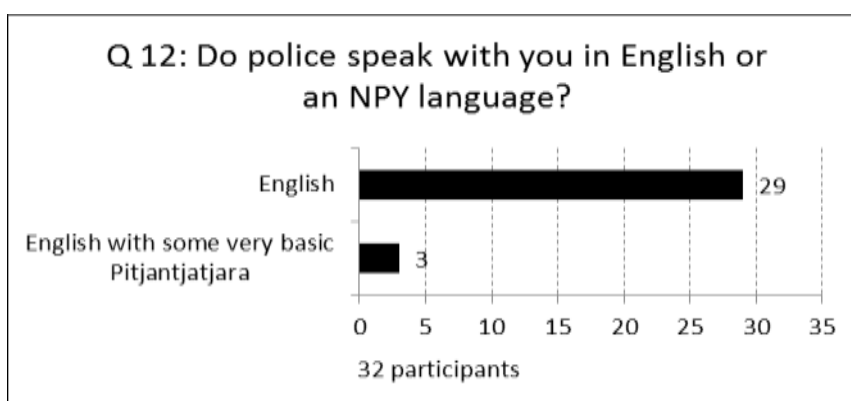


Figure 4.9 — 2016 survey question 12, APY Anangu

The ‘very basic Pitjantjatjara’ mentioned in Figure 4.9 was reported as being simple words and phrases such as *uwa* (yes), *wiya* (no) and the general greeting, *Nyuntu palya*?¹³¹

While Figure 4.10 shows that 20 interviewees believe that police do not understand Anangu culture, largely all were dissatisfied, verified in Figure 4.11, where a similar number volunteered comparable additional information. These results are indicative of a cultural divide between police and Anangu.

¹³¹ Pitjantjatjara for ‘Are you good?’ — there are no specific Pitjantjatjara words for ‘hello’ or ‘goodbye’.

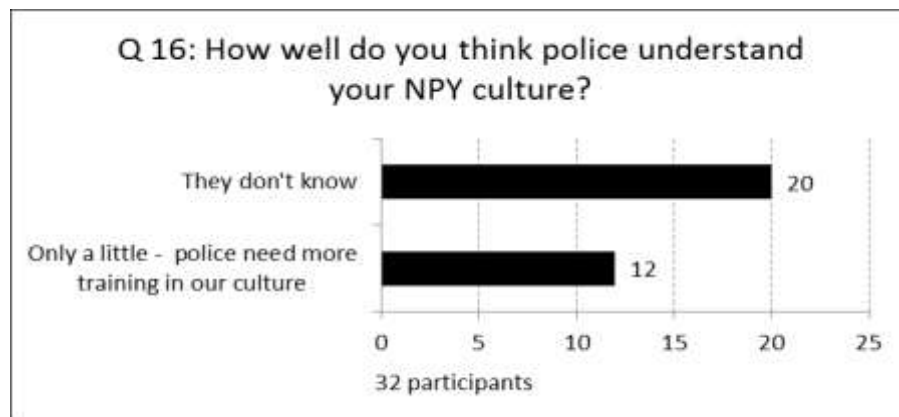


Figure 4.10 — 2016 survey question 16, APY Anangu

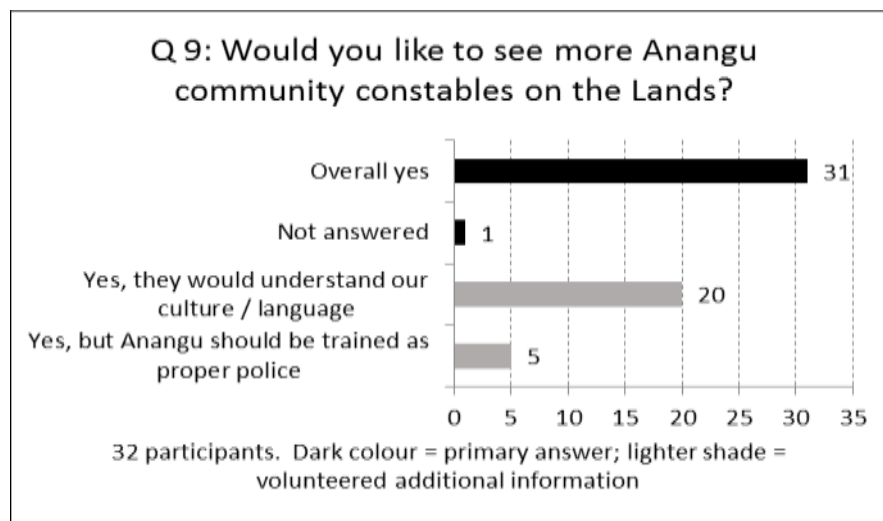


Figure 4.11 — 2016 survey question 9, APY Anangu

Figure 4.12 reveals that 12 of the 32 interviewees spoke of the disrespect SAPOL members show by arresting Anangu attending traditional ceremonies, viewed as a serious cultural affront and reinforcing expressions of dissatisfaction shown in Figures 4.9 to 4.12.

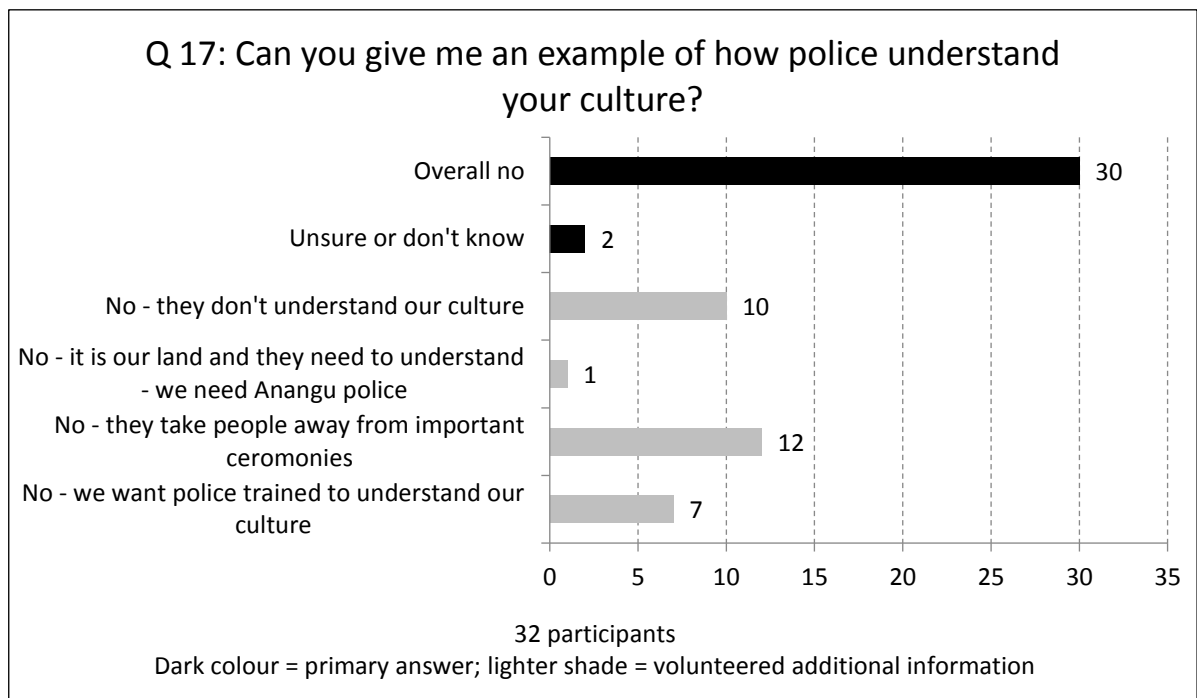


Figure 4.12 — 2016 survey question 17, APY Anangu¹³²

B Cultural Training for APY Lands Police

Although written from the perspective of interpreting Pitjantjatjara before courts and for other government institutions, Bill Edwards, an academic, former long-serving pastor in the APY Lands, and a certified Pitjantjatjara interpreter with the Interpreting and Translating Centre within the Multicultural and Ethnic Affairs Commission, makes it clear that an understanding of Anangu culture and language is essential when working in the Lands.¹³³ Edwards further reports that:

The Pitjantjatjara language has an extensive vocabulary which adequately expresses the cultural life of the people. It is rich in terminology related to their hunting and gathering economic mode, their system of kinship and other social relationships and their mythology and ritual life. The structures of the language involved precision of expression.¹³⁴

¹³² The 'Overall no' in this chart is not that the interviewees did not wish to answer the question, but a statement that police do not understand Anangu culture.

¹³³ See generally Bill Edwards, 'Putuna Kulilpai: Interpreting for Pitjantjatjara people in courts' (1999) 14 *Journal of Judicial Administration* 99; when I was a police officer in the Lands in the late 1970s and again in the 1980s I often made use of Bill Edwards as an interpreter when interviewing alleged Anangu offenders.

¹³⁴ Ibid 105.

The complexity of the language is further demonstrated where, '[g]rammatical structures include four conjugations of verbs, four declensions of nouns (with two sub-classes). The distinctions between proper and common nouns and between transitive and intransitive verbs are vital.'¹³⁵ Edwards explains that the language 'is further complicated by the fact that Pitjantjatjara does not have a word which exactly takes the place of the English "or". For example, in hospitals, when Pitjantjatjara patients are asked "Do you want tea or coffee?" they almost invariably answer *uwa*, meaning "yes", which leaves the tea-lady perplexed.'¹³⁶ As explained by barrister David Ross, '[l]anguage, culture and land are all entwined. It is difficult to know one in the absence of the others.'¹³⁷

In 1985, SAPOL identified the need for comprehensive and high quality cultural training of its members, without which SAPOL 'could well have been accused of paying "lip service" to this area.' At that time training was 'a half-day session in the [initial] recruit training course', one that was 'limited in time and content, especially considering the magnitude of the issue.'¹³⁸ This report recommended more effective training be established using 'specialist educators from a tertiary institution ... [and] it is equally important to involve Aboriginal people as much as possible in the training.'¹³⁹ Although the Police Commissioner had assigned a review of cultural training to the Training and Education Branch in October 1984,¹⁴⁰ no training had been delivered by the time I departed Marla in 1988.

Ten years later, the 2008 Mullighan Report recommended that 'all police officers positioned in the permanent placements on the Lands, or otherwise working on the Lands, undertake cultural training specifically designed to facilitate their working with Anangu people of the Western Desert.'¹⁴¹ By then, SAPOL were still 'examining a range of initiatives to ensure that officers selected to work on the APY Lands have the necessary experience and suitability, as well as appropriate levels of cultural

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ David Ross, 'Criminal law practice: Defending Aboriginal people' (2007) 31(2007) *Criminal Law Journal* 332, 333.

¹³⁸ Richardson, above n 1, 19.

¹³⁹ Ibid 19–22 [5.3].

¹⁴⁰ Ibid 19.

¹⁴¹ Mullighan, above n 19, Recommendation 40, 247.

awareness.’¹⁴² More recently, according to the Police Ombudsman’s 2015 Annual Report, it appears that 30 years later a cultural training course was still ‘currently under development’,¹⁴³ but nothing had been achieved by early 2016.¹⁴⁴

The lack of suitable training provided by SAPOL stands in contrast to cultural awareness programs provided by the South Australian Courts Administration Authority. In 2011, 17 judicial officers and two staff members attended a five-day cultural awareness and fact-finding tour of the APY Lands.¹⁴⁵ The Authority produced a DVD of this visit.¹⁴⁶ The Authority’s Aboriginal Justice Officers (AJOs) also conduct two-day Aboriginal cultural awareness training programs which are also available to legal practitioners.¹⁴⁷

Cultural awareness programs are therefore only available at the prosecutorial end of the process, after Anangu are already involved in the courts. They are not available at the mediation/peace-keeping starting point of the process, the policing stage when informal adjudication might occur to keep people out of the courts. Further details of this and similar programs will be discussed in chapters 5 and 6.

Given the lack of cultural awareness training by SAPOL, it is unsurprising that Anangu feel that SAPOL members do not understand their culture and language. There are, of course, exceptions. It is reported that in recent times some officers have made a serious attempt to learn about Anangu culture. Of note is the award-winning work performed by Ellie Scutchings, a SAPOL child abuse investigator in the Lands, assisting Anangu women with their art.¹⁴⁸ Nevertheless, such activities rely on individual initiative. Given the language and cultural gap evident from the previous sections, there is an

¹⁴² Government of South Australia, above n 100, response to Mullighan Report recommendation 40, 65–6.

¹⁴³ Attorney-General (SA), ‘Police Ombudsman Annual Report 2015’ (2015) 14.

¹⁴⁴ Telephone discussion with John Flavell, retired police sergeant and officer in charge at Marla from 2000 to 2016 (31 January 2017).

¹⁴⁵ Courts Administration Authority (CAA), ‘Report of the Judges of the Supreme Court of South Australia to the Attorney General pursuant to Section 16 of the *Supreme Court Act 1935* (SA) for the year ended 31 December 2011’ (2011) 6.

¹⁴⁶ Courts Administration Authority, ‘The Ripple Effect’ (2011) <<https://www.youtube.com/watch?v=Ten2mRjiCFI>>.

¹⁴⁷ Courts Administration Authority SA, ‘Aboriginal Programs - Aboriginal Cultural Awareness Training’ (2017) <<http://www.courts.sa.gov.au/Community/Pages/Aboriginal-Programs.aspx#training>>.

¹⁴⁸ Claire Campbell, ‘Art project between Anangu women and APY Lands police officer wins SA award’, *ABC News* (online), updated 23 March 2016 <<http://www.abc.net.au/news/2016-03-23/apy-lands-art-project-with-police-officer-wins-award/7270772>>; see also SAPOL, ‘Annual Report’ (2015-2016) 20.

urgent need for appropriate and relevant formal training of SAPOL officers. It is unfortunate that permission to interview SAPOL officers on the Lands was denied as proposed questions included those related to cultural training.

The lack of understanding of culture and language by police were made clear during my 2016 interviews with Anangu at Ernabella. Two *pampas* (elderly women) with very poor English revealed that on separate occasions they had an urgent need for police assistance. One woman, being unable to use a telephone, attended the nearby Ernabella police station but found its gate locked. Police were heard inside, but they did not answer her calls and out of desperation she threw a stone onto the roof to attract attention. When police did appear, she was unable to clearly communicate her problems and officers made no attempt to obtain the services of an interpreter to assist.

In short, there appears to be a lack of cooperation and communication between SAPOL officers and community members. One survey participant, a senior and well-respected Ernabella *Tjilpi*,¹⁴⁹ commented that '[t]he police are like rabbits. When there is trouble in the community they all run out of their warrens, grab people and disappear back down their rabbit holes without telling people what is happening.' Another used the analogy of a trap-door spider. They explained that in small inclusive Anangu communities, people need to know what is happening to their fellow community members as their arrest could seriously impinge upon important cultural ceremonies or other events that affect the offender and the whole community. Such actions tend to deepen the dissatisfaction of police services on the Lands and further support Anangu experience of a lack of cultural awareness by officers.

In late 2016 APY police exhibited a serious lack of cultural awareness when they removed the remains of a long-deceased Anangu child from a sacred site in the Lands for examination in Adelaide — an action that caused considerable anguish for local people. The remains, and the non-suspicious circumstances surrounding the death, were well known to local Anangu, but the police and other government agencies made no

¹⁴⁹ A senior *wati* (traditionally initiated man).

attempt to speak with traditional people. It was reported to the media that police seemed not to care what Anangu thought but did later apologise.¹⁵⁰

C *Police Cautions, Interpreters and Bail*

1 *The Right to Silence and Police Cautions*

The right to silence is enshrined in the common law and legislation.¹⁵¹ In *McDermott v R*, Dixon J stated:

At common law a confessional statement made out of court by an accused person may not be admitted in evidence against him upon his trial for the crime to which it relates unless it is shown to have been voluntarily made. This means substantially that it has been made in the exercise of his free choice.¹⁵²

Furthermore, the High Court in *R v Lee* unanimously stated: ‘The word “voluntary” in the relative connections does not mean “volunteered”. It means made in the exercise of a free choice to speak or be silent.’¹⁵³

Whenever a person has been apprehended by police on suspicion of having committed an offence, ‘the person is, while in custody, entitled to refrain from answering any question (unless required to answer the question under this or any other Act or law).’¹⁵⁴ Moreover, as soon as is reasonably practicable after apprehending a person, police must ‘warn the person that anything that he or she may say may be taken down and used in evidence.’¹⁵⁵ A standard form of this warning is: ‘I am going to ask you some questions. You do not have to say anything, but anything you do say will be taken down and may be used in evidence. Do you understand that?’¹⁵⁶

¹⁵⁰ Rebecca Opie and Matt Coleman, ‘Police exhume Indigenous baby’s remains without speaking to elders, administrator says’, *ABC New (online)* (Adelaide, 6 February 2017) <<http://www.abc.net.au/news/2017-02-06/removal-of-bones-from-an-aboriginal-baby-grave/8244564>>.

¹⁵¹ *Summary Offences Act 1953* (SA) s 79A(1)(b)(iii) and (3)(b).

¹⁵² *McDermott v R* (1948) 76 CLR 503, 512 (Dixon J).

¹⁵³ *R v Lee* (1950) 82 CLR 133, 149 (Latham CJ, McTiernan, Webb, Fullagar and Kitto JJ).

¹⁵⁴ *Summary Offences Act 1953* (SA) s 79A(1)(b)(iii).

¹⁵⁵ *Ibid* s 79A(3)(b); referred to hereinafter as the ‘police caution’; see also SAPOL, *General Order: Arrest and Custody Management* (2014) 18.

¹⁵⁶ Personal knowledge as a former SA police officer.

The relevance of Aboriginal language and culture regarding police interviews has attracted considerable academic and judicial discussion.¹⁵⁷ Dr Michael Cooke, for example, writes of the ‘pervasive and insidious’ nature of ‘unrecognised miscommunication’ and its effect on the whole criminal law process from ‘police interviews, in instructing counsel, giving evidence and in understanding trial proceedings.’¹⁵⁸ Cooke also points out that miscommunications are often used for tactical purposes and expresses concern about the use of interpreters who are ‘inadequately trained or skilled for legal interpreting.’¹⁵⁹ Although often with good intentions, all those involved in miscommunication ‘effectively combine to prop up a dysfunctional [criminal justice] system.’¹⁶⁰

Edwards reflected on the practical difficulties when interpreting Pitjantjatjara in courts:

The interpreter is faced with a dilemma early in court cases when the defendant and other witnesses are asked to “swear the truth”. In English the word “swear” is used to refer both to binding oneself by an oath and to uttering profanities. A Pitjantjatjara speaker hearing this word will associate it with *warkinyi* and think of it in terms of the latter meaning only. The taking of a plea also involves finding a term which can convey the meaning of the terms “guilty” and “not guilty”.¹⁶¹

Regarding police cautions, the words ‘you do not have to’ are often interpreted by Aboriginal people with English as a second language, or those who use Aboriginal English,¹⁶² as being ‘you must not answer’.¹⁶³ Further confusion is often experienced by the fact that on one hand, the police officer is saying that he is going to ask questions, but on the other, the interviewee must not answer. To Anangu, it can be a perplexing situation — what is the officer talking about? He wants to talk to me, but I can’t answer him. Or, alternatively, ‘Why are you asking me questions when I don’t

¹⁵⁷ See, eg, Heather Douglas, ‘The Cultural Specificity of Evidence: The Current Scope and Relevance of the *Anunga* Guidelines’ (1998) 21(1) *University of New South Wales Law Journal* 27; see also Edwards, above n 133; see also Ross, above n 137.

¹⁵⁸ Michael Cooke, ‘Anglo/Aboriginal communication in the criminal justice process: A collective responsibility’ (2009) 19 *Journal of Judicial Administration* 26, 26.

¹⁵⁹ *Ibid.*

¹⁶⁰ Cooke, above n 158.

¹⁶¹ Edwards, above n 133, 105.

¹⁶² Language consisting of an Aboriginal person’s native language and English. Speakers are highly influenced by the active voice of their first language when using English.

¹⁶³ Cooke, above n 158.

have to talk to you?’ A common response by Anangu is to reply with either yes or no but in reality, having no understanding of their right to silence if that is their choice.¹⁶⁴

The problems are compounded by Pitjantjatjara speakers and those speaking Aboriginal English who may use silence, gestures and avoid eye contact, seen as being associated with untruthfulness by non-Aboriginal people. Body language is often a cultural response to questions from people they see as being in authority. Others may be shy or feel shame (*kunta* in Pitjantjatjara), a concept ‘which has no similar equivalent in non-Aboriginal society but is a mixture of embarrassment and fear.’¹⁶⁵ The degree to which shame can affect an Aboriginal defendant is demonstrated in the unreported Queensland case of *R v Kina*¹⁶⁶ where the female defendant, charged with the murder of her de facto husband who had physically and sexually assaulted her over a three year period. During her successful appeal, it was revealed that she was shamed by the events and that her earlier silence ‘was interpreted (by her lawyers) as a sign of her apparent unwillingness to cooperate and ultimately (by the court), as a sign of her guilt.’¹⁶⁷ None of her lawyers had ‘received any training or instruction concerning how to communicate or deal with Aborigines or Islanders.’¹⁶⁸

Some Aboriginal people may feel obliged to speak with police,¹⁶⁹ while others may ‘play up their involvement in an incident for theatrical effect which derives from a tradition of story-telling’ — they may even feel culturally obliged to ‘take the rap’ for a relative’s actions.¹⁷⁰ Many Aboriginal people ‘will answer questions by white people in the way in which they think the questioner wants.’¹⁷¹ A term often used to describe this phenomenon is gratuitous concurrence, defined by Cooke as ‘a sociolinguistic characteristic, which has long been recognised as a feature of police and courtroom interviews involving Aboriginal people.’¹⁷² Edwards also commented on gratuitous

¹⁶⁴ See generally *ibid.*

¹⁶⁵ Edwards, above n 133, 108.

¹⁶⁶ *R v Kina* (Unreported, Queensland Court of Appeal, 29 November 1993).

¹⁶⁷ Heather McRae et al, *Indigenous Legal Issues, Commentary and Materials* (Lawbook, 4th ed, 2009) 546.

¹⁶⁸ *Ibid.*

¹⁶⁹ Douglas, above n 157, 29.

¹⁷⁰ *Ibid.*, citing Submission of Mr. Carberry, representative of the Queensland Aboriginal and Torres Strait Islander Legal Service to the Criminal Justice Committee Report, *Review of Police Powers in Queensland, Vol IV, Suspects Rights, Police Questioning and Pre-Charge Detention*, 1995 at 184.

¹⁷¹ *R v Anunga* (1976) 11 ALR 412 [50] (Forster J).

¹⁷² Cooke, above n 158, 27.

concurrence, stating that ‘Aboriginal people are often uncomfortable about the way non-Aboriginal people ask them questions because of the significant cultural differences in the ways of eliciting information ... Aboriginal people often answer ‘yes’ to what is asked.’¹⁷³ Dr Lorana Bartels similarly describes gratuitous concurrence as occurring when Aboriginal people ‘freely say “yes” in response to a yes/no question, regardless of their understanding of the question or their belief in the truth or falsity of the proposition.’¹⁷⁴ Gratuitous concurrence has been recognised as early as the late 19th century.¹⁷⁵

Of equal significance, and invariably not considered by police or courts, are serious hearing problems. As reported in chapter 3, deafness caused by middle-ear infections is endemic in the Lands.¹⁷⁶ As shame is culturally significant for Anangu, an alleged offender is unlikely to admit they have hearing problems and police should be aware of this when interviewing suspects. Importantly, in *Ebatarinja v Deland*¹⁷⁷ the High Court held that: ‘On a trial for a criminal offence, it is well established that the defendant [a deaf mute Aboriginal person] should not only be physically present but should also be able to understand the proceedings and the nature of the evidence against him or her.’¹⁷⁸

Although some attempt has been made to explain the intricacies of the Pitjantjatjara language, a full discussion is beyond the scope of this thesis. However, the bureaucratic English language of the law¹⁷⁹ inclines to the passive voice while Aboriginal languages are generally in the active voice. It can be extremely difficult to translate a passive English sentence into the active voice required for understanding by Anangu, as demonstrated by the very lengthy early translation of the Northern Territory Police caution shown in Appendix 6A. Even where Anangu speak English, it is often Aboriginal English, where speakers are influenced by the active voice of their first

¹⁷³ Edwards, above n 133, 107.

¹⁷⁴ Lorana Bartels, ‘Police interviews with vulnerable adult suspects: report No. 21’ (Australian Institute of Criminology, July 2011) <<http://www.aic.gov.au/publications/current%20series/rip/21-40/rip21.html>>.

¹⁷⁵ See, eg, Amanda Nettelbeck, ‘Keep the magistrates straight: Magistrates and Aboriginal ‘management’ on Australia’s north-west frontiers, 1883-1905’ (2014) 38 *Aboriginal History* 25.

¹⁷⁶ See also Douglas, above n 157, 29.

¹⁷⁷ *Ebatarinja v Deland* (1998) 194 CLR 444.

¹⁷⁸ *Ibid* [26] (Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

¹⁷⁹ Used for example in legislation and often used by police officers; see generally Samantha Disbray, ‘Communication Matters: new language varieties and new interactions in legal contexts’ (2016) <https://www.google.com.au/?gws_rd=ssl#q=Are+aboriginal+languages+passive+or+active>.

language and the same problems can be experienced.¹⁸⁰ Importantly, just because Anangu appear to speak reasonably fluent English does not necessarily mean they understand the nuances and concepts contained in English.¹⁸¹

One way to address language problems is through using interpreters, but evidence indicates they are not regularly used, as shown in Figure 4.13:

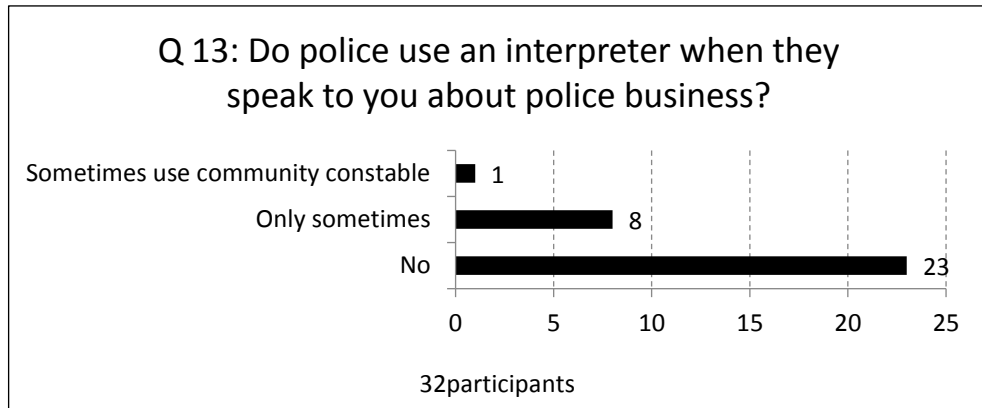


Figure 4.13 — 2016 survey question 13, APY Anangu

Figure 4.14 reveals that the majority of interviewees stated that they were not aware of any rights they had when spoken to by police:

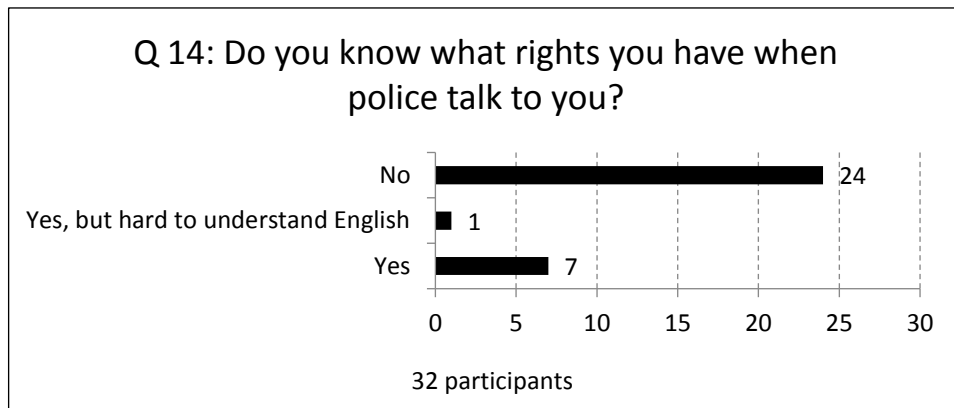


Figure 4.14 — 2016 survey question 14, APY Anangu

¹⁸⁰ See, eg, Diana Eades, ‘Aboriginalised English: Implications in legal contexts in the Northern Territory’ (Northern Territory Supreme Court Language and Law II Conference, August 2015) 3-4.

¹⁸¹ See generally Edwards, above n 133.

This data is substantiated by the following graph, obtained from a survey of legal practitioners in 2016, where seven of the eight participants believed that the police caution is not understood by Anangu.

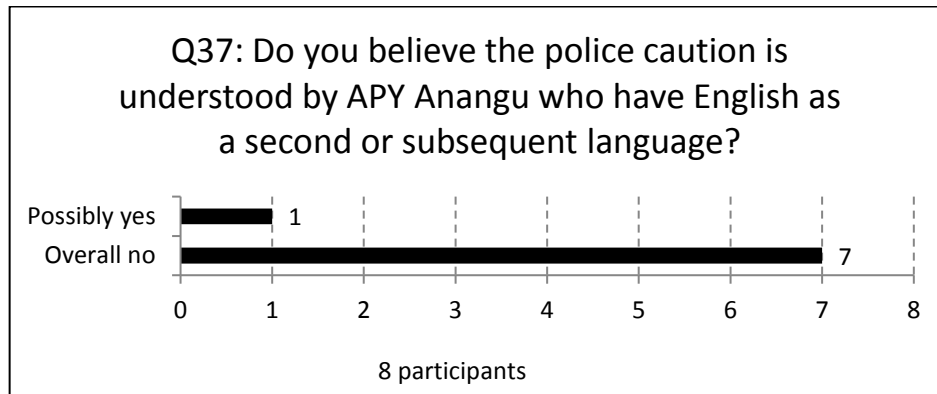


Figure 4.15 — 2016 survey of legal practitioners involved in APY Courts

Although not particularly clear as to the circumstances under which police may have cause to give advice to persons of their rights, the majority of those surveyed revealed police say nothing about those rights — see Figure 4.16.



Figure 4.16 — 2016 survey question 15, APY Anangu

Given the proclaimed importance of community policing,¹⁸² and the small size of APY communities, SAPOL are ideally positioned to take a proactive lead in educating local people about their functions, including advice on a person's right to silence when being interviewed. These matters are discussed further in chapter 6.

¹⁸² See Mullighan, above n 19, 236–7; see also South Australia Police, Community Programs <<https://www.police.sa.gov.au/services-and-events/community-programs>>.

Although police are required to provide arrested Anangu with a copy of the printed information from the Aboriginal Legal Rights Movement (ALRM),¹⁸³ the information is in English and has not been translated into Pitjantjatjara, the written form of which most Anangu can read and understand.

The translation of the police caution (right to silence) provides an excellent example of language difficulties where the translated English to Pitjantjatjara version occupies seven pages.¹⁸⁴ A 16-minute audio recording of this translation was, until recently, used by the Northern Territory police when interviewing Anangu. A much shorter version is now being used as a mobile telephone application by the Northern Territory police — there are two versions available, one for persons in custody and another for persons not in custody.¹⁸⁵ SAPOL officers do not make use of any form of translated police caution or audio recording when interviewing alleged Anangu offenders on the Lands or elsewhere.

Misunderstanding of the police caution, and interviews generally, were addressed in 1976 by *R v Anunga*,¹⁸⁶ when Forster J strongly recommended nine ‘rules’ that should be followed when police interview Aboriginal people.¹⁸⁷ Those related to language include, inter alia:

- (1) Where an Aboriginal person is being interrogated as a suspect, *unless he is as fluent in English as the average white man of English descent*, an interpreter able to interpret in and from the Aboriginal person’s language should be present, and his

¹⁸³ SAPOL, *General Order: Arrest and Custody Management* (2014), 21; see also Appendix 5 of this thesis.

¹⁸⁴ The translation of the caution to Pitjantjatjara was originally commissioned by the Department of the Attorney-General and Justice in the Northern Territory and was co-written by linguist Paul Eckert, a lecturer with the University of South Australia (UniSA), specialising in the Pitjantjatjara language; see Appendix 6A of this thesis.

¹⁸⁵ See Northern Territory Government: Department of Housing and Community Development, *Aboriginal language police cautions - Aboriginal Interpreter Service (Police Caution in Pitjantjatjara)* <<https://dhcd.nt.gov.au/community-development/aboriginal-language-police-cautions-aboriginal-interpreter-service>>; information also personally obtained from Senior Sergeant Michael Potts, Alice Springs Police Station; A report of the use of a CD recording of the caution appears in *R v Robinson* [2010] NTSC 09. 8 [13] — the original recording extends over 16 minutes, compared with the 2015 version of only three minutes; an audio recording of the latest version can be found at: <<https://www.youtube.com/watch?v=t7oBB4INrQI&feature=youtu.be>>; see also Appendix 6B of this thesis.

¹⁸⁶ *R v Anunga* (1976) 11 ALR 412.

¹⁸⁷ The rules as set by Forster J in *Anunga* are often referred to as ‘The Anunga Guidelines’, or the ‘Anunga Rules’).

assistance should be utilized whenever necessary to ensure complete and mutual understanding.

- (2) [i]t is desirable ... that a 'prisoner's friend' (who may also be the interpreter) be present ... [he/she] should be *someone in whom the Aboriginal has confidence, by whom he will feel supported*.
- (3) Great care should be taken in administering the caution when it is appropriate to do so. It is simply not adequate to administer it in the usual terms and say, 'Do you understand that? Or 'Do you understand you do not have to answer questions?' *Interrogating police officers, having explained the caution in simple terms, should ask the Aboriginal to tell them what is meant by the caution, phrase by phrase, and should not proceed with the interrogation until it is clear the Aboriginal had apparently understanding of his right to remain silent ...* The problem of the caution is a difficult one but the presence of a 'prisoner's friend' or interpreter and adequate and simple questioning about the caution should go a long way towards solving it.¹⁸⁸

As Justice Forster acknowledged, '[t]hese guidelines are not absolute rules, departure from which will necessarily lead to statements being excluded, but police officers who depart from them without reason may find statements are excluded.'¹⁸⁹ It is important to note that the guidelines apply to *any person* who is not as fluent in English as 'the average white man of English descent.'¹⁹⁰

Anunga was the first to judicially acknowledge the extent of the language and cultural gap between Aboriginal people and the police and was an important step in the development of culturally appropriate practices. In particular, the *Anunga Guidelines* formed the basis of many police general orders throughout Australian states. It is also a case that has been raised in many appeals throughout Australia involving the admissibility of police statements.¹⁹¹

Despite these well-known issues, police often appear oblivious to the need to treat *Anangu* fairly and justly during interrogations. Alternatively, as suggested by Michael

¹⁸⁸ *R v Anunga* (1976) 11 ALR 412, 414, 415 (Forster J) (emphasis added).

¹⁸⁹ *Ibid* 415 [45–50].

¹⁹⁰ *Ibid*.

¹⁹¹ See, eg, *R v Robinson* [2010] NTSC 09; *Western Australia v Gibson* (2014) WASC 240; see also *Frank v Police (SA)* [2007] SASC 288 regarding the importance of using interpreters in court proceedings.

Cooke, police may be using misunderstanding for misguided tactical reasons.¹⁹² APY Anangu have as much right as other Australians to be treated in a just manner by the criminal justice system and more specifically, '[i]f Aboriginal people are not treated fairly at the interrogation stage, they are more likely to confess to crimes which they have not committed, leaving them more open to inappropriate convictions.'¹⁹³ *R v Jimmy Marmowa*¹⁹⁴ provides an example of the difficulties experienced by police when interviewing Aboriginal persons and is also one where a police interview was ruled inadmissible due to problems regarding police cautions. A more complete discussion regarding interpreters is dealt with below.

What the foregoing suggests is that a properly developed and delivered cultural training program would provide APY police with a capacity to recognise language and cultural differences and a capacity to engage Anangu in culturally sensitive interactions. Meaningful and practiced cultural awareness would also play an important role in SAPOL gaining the trust of Anangu in the communities and would, no doubt, go a long way to mitigating the current dissatisfaction with police services on the Lands

2 Interpreters

Where the native language of witnesses who are to give oral evidence in any court proceedings is not English, and they are not reasonably fluent in English, witnesses are entitled to give evidence through an interpreter.¹⁹⁵ Furthermore, the right of a court to exclude evidence improperly obtained is contained within the common law and in statute.¹⁹⁶ The prosecution must prove on the balance of probabilities that admissions made in a record of interview are voluntary.¹⁹⁷

Where a person is apprehended by police, with or without a warrant, if English is not their native language, they are entitled, if they require, to be assisted at an interrogation by an interpreter.¹⁹⁸ An arresting officer must advise the person of the reasons for their

¹⁹² Cooke, above n 158, 30.

¹⁹³ Douglas, above n 157, 54.

¹⁹⁴ *R v Jimmy Marmowa* (1996) NTSC 199/95 (20 November 1996) (Thomas J).

¹⁹⁵ *Evidence Act 1929* (SA) s 14(1).

¹⁹⁶ See, eg, *Bunning v Cross* (1978) 141 CLR 54; see also *Evidence Act 1929* (SA).

¹⁹⁷ *Bunning v Cross* (1978) 141 CLR 54, 318 (Brennan J).

¹⁹⁸ *Summary Offences Act 1953* (SA) s 79A(1)(b)(ii).

arrest in a manner that is understood by that person.¹⁹⁹ Section 83A of the *Summary Offences Act 1953* (SA) offers further support. Where a person whose native language is not English is suspected of having committed an offence, they are entitled to be assisted by an interpreter during any questioning by an investigating officer in the course of investigating the suspected offence. Where it appears that a person may be so entitled, questioning of the person must not proceed until they have been informed of the right to an interpreter. If that person requests assistance of an interpreter, police must not proceed with any questions until an interpreter is present. SAPOL General Orders state that arresting officers are required to ‘ensure that the prisoner is advised of their rights pursuant to section 79A of the Summary Offences Act 1953 as soon as practicable after their arrest’,²⁰⁰ but is silent regarding s 83A.

SAPOL general orders relating to the use of interpreters for suspects, victims and witnesses states:

Prior to commencing an interview with a person, if the member doubts the ability of that person to understand or speak English, or if the person requests it, the member must arrange or an interpreter to be present before continuing with the interview. The interpreter must be independent of the people involved, professionally trained and formally qualified. Do not use a fellow employee of the suspect, victims or witnesses or a member of their family.

The order also sets out the process for requesting an interpreter and the interview procedure.²⁰¹

There is a sting in the tail of s 79A where the interrogated person *must request assistance*. An additional sting is contained in s 83A, in which an obligation to provide an interpreter only arises ‘*where it appears* that a person may be entitled to be so assisted by an interpreter’, a matter requiring the exercise of judgment or discretion by the interrogating officer. The same judgment is also required by police in the above-mentioned general order regarding the provision of interpreters. In a submission to the Law Reform Commission of Western Australia into Aboriginal Customary Laws,

¹⁹⁹ See, eg, *Hull v Nuske* (1974) 8 SASR 587, 594; see also *R v Conley* (1982) 30 SASR 226, 239.

²⁰⁰ SAPOL, above n 183, 18.

²⁰¹ Bartels, above n 174, 9.

Michael Cook referred to a reluctance of Northern Territory police to engage interpreters when interviewing Aboriginal offenders.²⁰² Police who have a poor understanding of the unique aspects of Aboriginal English may believe the speaker is a reasonably fluent English speaker and proceed accordingly. This means it is not appropriate to leave a judgment about a person's ability to understand questions to individual officers. This contention is reinforced by the data shown in Figures 4.13 and 4.16 of this chapter.

Suitably qualified and professionally trained interpreters are not formally employed or utilised by SAPOL. APY officers, in direct conflict with general orders, generally make use of a suspect's family members or friends or Community Constables when interpreters are required. Gratuitous concurrence can also affect the veracity of these informal interpreters, not to mention familial cultural obligations that may be present, casting doubt on the interpreter's ability to interpret correctly.

The dearth of interpreters was clearly demonstrated in *Frank v Police*,²⁰³ where the excessive number of failed attempts for an interpreter to assist the appellant in the original Magistrates Court hearing, and during the appeal before the SA Supreme Court, resulted in the original sentence being set aside. Sulan J stated that if an interpreter could not be found at the adjourned re-sentencing hearing, he would order a stay of the proceedings.²⁰⁴

(a) *Significant inquiries regarding interpreters*

The problems associated with interpreters has been long-recognised in significant inquiries including the 1991 Royal Commission into Aboriginal Deaths in Custody (RCADIC).²⁰⁵ The paucity of interpreters was also raised by Coroner Wayne Chivell in his 2005 inquest into the deaths of four petrol sniffers from the Lands.²⁰⁶ The 2008 Mullighan Report recognised that '[t]he criminal justice system has long been vexed by the lack of suitable interpreters in matters involving Aboriginal people and Anangu in

²⁰² Michael Cooke, 'Caught in the middle: Indigenous interpreters and customary law', Background paper no. 2. Perth: Law Reform Commission of Western Australia' (2006) 101.

²⁰³ *Frank v Police (SA)* [2007] SASC 288.

²⁰⁴ *Ibid* [76].

²⁰⁵ Commonwealth, 'Royal Commission into Aboriginal Deaths in Custody National Report' (1991).

²⁰⁶ Chivell, above n 14, Recommendation 9.

particular.²⁰⁷ The Report recommended that a training program ‘be developed by an established tertiary education organisation ... as a matter of urgency.’²⁰⁸ The same concerns were echoed by the Nyland Child Protection Systems Royal Commission, which reported that by 2016 ‘the shortage of interpreters remains.’²⁰⁹ This Royal Commission also reported that:

The South Australian Government would not contemplate sending practitioners to investigate child abuse in a non-English speaking country without reliable access to accredited interpreters. It is unrealistic to expect the Agency’s practitioners to operate in remote communities where English is commonly a second or third language without reliable access to interpreters. The difficulty in accessing interpreters encourages these practitioners to proceed without an interpreter in cases where they should not. This inevitably produces sub-optimal results.²¹⁰

Although written from the perspective of child protection, these comments also hold true for all SAPOL officers working on the Lands.

(b) *Federal Government concerns*

The question of using interpreters in remote Aboriginal communities has been a concern for the Federal Government as evidenced by a number of reports. For example, a Federal Government report, ‘National Aboriginal Languages Survey Report 2005’,²¹¹ stated that: ‘[t]his lack of equality [in providing interpreting services for Aboriginal people] can have life threatening consequences in health care, can result in miscarriage of justice and many other disadvantages for Aboriginal people.’²¹² In 2011, the Commonwealth Ombudsman released a report, ‘Talking in Language: Aboriginal Language Interpreters and Government Communication’,²¹³ which ‘indicates that Aboriginal language interpreters are not always used when they should be.’²¹⁴ A 2016

²⁰⁷ Mullighan, above n 19, 248. Recommendation 42.

²⁰⁸ Ibid 249.

²⁰⁹ South Australia, ‘Child Protection Systems Royal Commission Report: *The life they deserve*’ (2016) pt V, 472.

²¹⁰ Ibid.

²¹¹ Australian Institute of Aboriginal and Torres Strait Islander Studies, ‘National Indigenous Languages Survey Report 2005’ (2005).

²¹² Ibid 90.

²¹³ Commonwealth Ombudsman, ‘Talking in Language: Indigenous Language Interpreters and Government Communication’ (2011).

²¹⁴ Ibid 1.

follow-up report, ‘Accessibility of Aboriginal Language Interpreters: Talking in Language Follow-up Investigation’,²¹⁵ found that a ‘coordinated whole of government response is still required. While there has been some progress, ongoing barriers to accessing interpreters continue to undermine communication between government and Aboriginal language speakers.’²¹⁶

The question of having appropriate interpreters, appropriate mechanisms for relaying police cautions, and appropriate cultural training for police, are all questions that have existed for a considerable time. The fact that government bodies, including SAPOL, keep acknowledging them as problems but not resolving them is surely, at least in part, due to this failure of a whole of government response.

(c) *SA Government concerns*

In 2014 the SA Department of the Premier and Cabinet prepared a report, ‘South Australian Policy Framework: Aboriginal Languages Interpreters and Translators.’²¹⁷ This policy framework was to ‘demonstrate the State’s commitment to “Closing the Gap”, through providing a coordinated policy approach across South Australian Government agencies and services for the effective provision and use of Aboriginal languages interpreting and translating services.’²¹⁸ The report further states that ‘[i]n the absence of a whole-of-government policy framework, there appears to be a lack of consistency in the provision and use of Aboriginal languages interpreting and translating services, leading to poor outcomes for Aboriginal people across a range of areas.’²¹⁹ The objectives of the framework include: ensuring all SA Government agencies acknowledge, understand and respond to the need for Aboriginal language interpreters; improve awareness across communities and agencies of the availability of such interpreters; assist in the development of an effective, coordinated Aboriginal language interpreting and translating system that is readily accessible to those in need; the application of minimum standards across agencies regarding such interpreting

²¹⁵ Commonwealth Ombudsman, ‘Accessibility of Indigenous Language Interpreters: Talking in Language Follow up Investigation (Report No 06/2016)’ (2016).

²¹⁶ *Ibid* 1.

²¹⁷ Department of the Premier and Cabinet (SA), ‘South Australian Policy Framework: Aboriginal Languages Interpreters and Translators’ (2014).

²¹⁸ *Ibid* 3.

²¹⁹ *Ibid* 5.

services; and to reduce disadvantage experienced by Aboriginal people where language is a barrier.²²⁰ However, the report makes it clear that the success of the framework ‘will, in large part, be determined by the level of agency commitment to its vision and objectives.’²²¹ Suggestions for a way forward on the interpreter issue will be offered in chapter 6.

3 *Excessive Police Bail Conditions*

An arrest is a serious intrusion upon a person’s liberty, the exercise of which has been long-recognised as one of last resort, echoed in SAPOL general orders:

An arrest must only be made in accordance with a lawful authority and only when necessary. All alternatives to an arrest must be considered before an arrest takes place. An arrest will only be made when those alternatives are either not applicable or practicable in the circumstances.²²²

The criteria for arrest must be based on reasonable grounds, used to:

- Ensure appearance before a court
- Prevent the loss or destruction of evidence
- Prevent the continuation or repetition of the offence
- Prevent the commission of other offences²²³

In consideration of the above, police take into account: the gravity of the offence, history of recidivism; history of offending when on bail; whether defendants will abscond, offend again, interfere with evidence, intimidate witnesses, hinder the police investigation; the need to protect any victim; and any other relevant matters.²²⁴ These conditions echo those in s 10 of the *Bail Act 1935* (SA). However, police do have an alternative to arrest — an offender can be reported for adjudication by a prosecutor, and where appropriate, a summons issued requiring their appearance in court.

²²⁰ Ibid 6–7 [3.2].

²²¹ Ibid 11 [5].

²²² SAPOL, above n 183, pt 4, 17; see, also Commonwealth, above n 205 (RCIADC), recommendation 92.

²²³ SAPOL, above n 183.

²²⁴ Ibid.

Pursuant to the provisions of the *Bail Act* there is generally a presumption of bail for persons arrested.²²⁵ Bail authority can be exercised by a court, or if the person is in police custody, by an officer of or over the rank of sergeant or the responsible officer for a police station.²²⁶ Bail is an agreement with a person arrested or convicted who undertakes to agree with conditions,²²⁷ which may also include a personal guarantee or guarantor.²²⁸ The purpose of bail is to ensure the court attendance of the arrested person. Before granting bail, the authority must consider several matters as discussed in the previous paragraph — primary consideration is given to the protection of any victims of the offending.²²⁹

The exercise of a person's right to silence is not a ground in itself for refusing of bail. Police may hold a suspect for up to four hours for the purpose of investigation before they are taken to a police station — this may be extended for up to eight hours on application to a magistrate.²³⁰ Persons held during this period are not eligible for police bail and do not have to be advised of their right to bail.²³¹ Where bail has been refused, the arrested person must be brought before a court no later than 4.00 pm the next working day²³² — if this is not possible, an application can be made to a magistrate by telephone.²³³

Police must also comply with general orders and ensure:

as soon as reasonably practicable after arresting the person ... take reasonable steps to ensure the person understands ... they are entitled to apply for release on bail [and] that person receives a written statement ... explaining how and to what authorities an application for release on bail may be made, together with the appropriate form for making such an application.²³⁴

²²⁵ *Bail Act 1935* (SA) s 4, 10, and 10A.

²²⁶ *Ibid* s 5; a bail agreement used by police is generally referred to as 'police bail'.

²²⁷ *Ibid* ss 6 and 7.

²²⁸ *Ibid* ss 7 and 11.

²²⁹ *Ibid* s 10.

²³⁰ *Summary Offences Act 1953* (SA) s 78.

²³¹ *Bail Act 1935* (SA) s 4.

²³² *Ibid* s 13.

²³³ *Ibid* ss 14 and 15.

²³⁴ SAPOL, above n 183, pt 6, 77.

The *Bail Act* also provides for conditions which may be imposed on bail, including, inter alia, that the person: resides at a specific address; or reside at a specific address and to remain at that place of residence while on bail and not leave it except for reasons of employment, medical or dental treatment, or averting or minimising a serious risk of injury or death; or any other purpose approved by a community corrections officer.²³⁵ A police officer who has reasonable grounds to suspect that a person intends to abscond or is in breach of their bail conditions can arrest that person.²³⁶

SAPOL general orders make it clear that ‘there should be no bail conditions which are (or could be perceived to be) considered as a “penalty” to the accused.’²³⁷ It needs to be remembered that ‘[a] person on pre-trial bail has not been convicted of an offence and is to be treated as innocent until proven guilty.’²³⁸ Moreover, ‘bail is not a sentencing option, nor should it be an alternative to sentence.’²³⁹ In *R v Greenham*,²⁴⁰ Mann CJ held that ‘the discretion in certain circumstances to refuse bail can never be used by way of punishment.’ Unfortunately, there are no provisions in the *Bail Act* or in police general orders for police bail applicants to be represented by a solicitor. This and the question of bail being a punitive measure are of serious concern for Aboriginal people and for Anangu in particular.

A common bail condition is a requirement to reside at a specific address with nominated persons and to be present at all times between stated curfew times — eg, between 6.00 pm and 8.00 am. It is common practice to include the requirement for the accused person to present themselves to any police officers who attend that address during those times. When undergoing practical legal training with Port Augusta ALRM in 2014–15, I saw numerous case files which showed that police attend residences of those on a curfew several times a night, even into the small hours of the morning.²⁴¹ Freiberg and Morgan argue that curfews are a form of incarceration and, ‘[i]n many cases, such

²³⁵ *Bail Act 1935* (SA) s 11.

²³⁶ *Ibid* s 18.

²³⁷ SAPOL, above n 183, pt 6, 81.

²³⁸ Arie Freiberg and Neil Morgan, ‘Between bail and sentence: the conflation of dispositional options’ (2004) 15(3) *Current Issues in Criminal Justice* 220, 222.

²³⁹ *Ibid* 226.

²⁴⁰ *R v Greenham* [1940] VLR 236.

²⁴¹ Names and other details regarding these cases cannot be revealed due to reasons of client confidentiality.

sanctions were likely to be more intrusive than any sentence which was likely to be imposed by the court.²⁴² Moreover, '[i]n South Australia, after the introduction of the *Bail Act 1985*, correctional services staff became involved in the bail process in the preparation of bail suitability reports, by supervising offenders on bail through the introduction of home detention. The line between bail and sentencing in that jurisdiction is very blurred.'²⁴³ Police monitoring of curfews are onerous and remove the necessity of police requiring reasonable grounds to suspect contravention of a bail condition.²⁴⁴

Another equally onerous condition is the requirement for the person to attend and personally report to their local police station, often several times a week. A condition of this nature if placed, for example, on Anangu who offend in Port Augusta, a regional centre over 800 kilometres from the Lands, has the potential to be extremely onerous. Many Anangu do not own motor vehicles or possess driver's licences, making it extremely difficult to comply with reporting obligations. Reporting obligations also serves to limit a person's ability regarding employment and education opportunities as well as impinging upon their attendance at culturally important events.²⁴⁵ In *R v Jajou*,²⁴⁶ it was held that where there have been delays in court proceedings, onerous bail conditions can be considered by a sentencing court.²⁴⁷

One bail condition of particular concern that has been imposed on Anangu arrested during visits to Coober Pedy is a condition to leave Coober Pedy before the end of the day and reside at a specified house in a particular Lands community, hundreds of kilometres north. With no public transport or other means of travel available, it is not surprising Anangu often fail to comply with such a condition and are arrested for breaching bail. The example is based on anecdotal evidence reported in discussions with Anangu during my field trips to the Lands. Unfortunately, direct evidence of such cases has been impossible to obtain due to the need to maintain client confidentiality,

²⁴² Freiberg and Morgan, above n 238, 224.

²⁴³ Ibid.

²⁴⁴ See *R v Nguyen* (2013) 117 SASR 430 and *R v Nguyen* [2015] SASCF 7 regarding reasonable cause to suspect.

²⁴⁵ See eg, Aboriginal Legal Service (NSW/ACT), 'Bail: questions for discussion' (A submission by the Aboriginal Legal Service (NSW/ACT) to the New South Wales Law Reform Commission, 22 July 2011) 5–6, 28–29.

²⁴⁶ *R v Jajou* (2009) 196 A Crim R 370.

²⁴⁷ See *R v Khamas* (1999) 108 A Crim R 499.

and the difficulty of obtaining copies of court files where no offender details are available.

Another anecdote reported to me about bail, and of particular concern, relates to a condition banning persons from being within a specified distance from a particular community, for example, not to be within 50 kilometres of Ernabella. This is highly impractical due to the layout of the major roads in the Lands. All major roads pass within only a few kilometres of other Lands' communities and if a person were to be so barred, travel between communities would prove impossible for those required to attend vital traditionally cultural events held throughout the region.²⁴⁸

Breaching bail conditions has an insidious effect on Aboriginal people. Often, because of onerous bail conditions, they have higher than normal rates of breaching bail, placing them in a position where, should they offend again, bail would come with increasingly onerous conditions and may not be granted at all. A particular concern relating to the escalation of the seriousness of the consequences of offending is that Aboriginal people may feel 'under pressure to plead guilty to the offence on the basis that their continuing detention will clearly exceed any likely penalty they may receive in severity.'²⁴⁹

Protection of the accused around the imposition of bail and bail conditions is important. Bail conditions are imposed before a finding of guilt and sentencing. Upholding this protection in the Lands is much harder because of remoteness and lack of access to magistrates and legal representation. This thesis contends that under these conditions, police on the Lands are required to exercise more discretion regarding questions of bail. However, in the context of problems with culture and language differences, police discretion alone is unsatisfactory where questions of bail and bail conditions exist. In a 2006 paper on bail and remand, Rick Sarre, et al, noted that bail decisions were linked to operational policing objectives and strategies:

Bail decision-making occurs in a time-pressured context and in accordance with the policy and cultural constraints of the various bail authorities, especially the police. In South Australia custodial remand was closely linked to operational policing objectives and strategies. For example, it is not uncommon to find operational policies that

²⁴⁸ Ibid.

²⁴⁹ Aboriginal Legal Service (NSW/ACT), above n 245, 6.

encourage arrest even where a summons could be more appropriate, or that use custodial remand as an incapacitation strategy to achieve crime reduction goals.²⁵⁰

Sarre also found that ‘[i]t became clear ... that it is very easy for police to merge their role as bail decision-makers with their role of crime preventers and crime investigators, and that custodial remand can be employed as a tool to achieve other police objectives such as crime reductions.’²⁵¹

Of concern is the use of onerous bail conditions as amounting to a penalty despite intentions to the contrary contained in police general orders. There are bail conditions in other settings that may be innocuous, that become a penalty in the context of arrests on the Lands as a result of geography and culture. These conditions may set Aboriginal people up to fail and given SAPOL’s proactivity in policing bail conditions,²⁵² they could be described as methods for controlling and unnecessarily monitoring Aboriginal offenders. As mentioned, such control can have serious adverse effects on a person’s participation in education and employment, and ability to abide by cultural law. These bail conditions also do little to improve Aboriginal/police relationships, a matter that must surely reflect badly on officers, providing further evidence of dissatisfaction with police services by Anangu and the lack of cultural awareness by police. There is a strong argument to be made that police bail should never be used as an instrument of law enforcement, and this will be discussed further in chapter 6.

D Police Prosecutors

Until the late 1980s, police prosecutors appearing before APY Court were local officers from Oodnadatta and later Marla.²⁵³ As such, they had first hand knowledge of Anangu and APY communities and, where applicable, were able to inform the court of the

²⁵⁰ Rick Sarre, Sue King and David Bamford, ‘Remand in custody: critical factors and key issues’ (Australian Institute of Criminology, Trends & Issues in crime and criminal justice 2006) 4.

²⁵¹ Ibid 5.

²⁵² See SAPOL, ‘Annual Report’ (2015-2016) 14 — breach of bail offences increased from 8463 offences in 2014–15 to 9949 in 2015–16, an increase of 17.6% (these figures do not differentiate between Aboriginal and non-Aboriginal offenders); see also Peta MacGillivray and Eileen Baldry, ‘Australian Indigenous Women’s Offending Patterns’ (2015) Brief 19 *Indigenous Justice Clearing House* 1, 5, where women made up ‘almost one third of all arrests for justice procedures (ie, breach of bail and similar offences)’.

²⁵³ The officer in charge and second officer in charge of county police stations were *ex officio* assistant police prosecutors.

effects of offending on communities. However, since that time, prosecutors have been sourced from the Port Augusta Police Prosecution Unit and lack knowledge of APY culture and language, which affects their ability to explain offences and to understand offending from an Anangu perspective. Since about 2014, several non-police legal practitioners have been employed as police practitioner prosecutors on a contractual basis, adding a further disconnect between Anangu and APY communities.²⁵⁴ Should a practitioner prosecutor have previous experience as a defence lawyer representing Anangu clients, questions of conflicts of interest may arise, a matter beyond the scope of this thesis.

V CONCLUSIONS

There is no doubt that a police presence is required within the APY Lands. However, when measured against the 2011 SAPOL evaluation of the Community Constable scheme, which identified that ‘[r]esponse times and accessibility to policing services are pointers to quality service delivery’,²⁵⁵ current policing practices in the Lands fall short. The empirical evidence, volunteered information and the reported lack of cultural awareness training provided to APY police as mentioned in this chapter all contribute to the high level of dissatisfaction by Anangu with APY policing.

The availability and use of interpreters needs to be addressed urgently in order for police to act fairly, honestly *and lawfully* when interrogating Anangu, where ‘unrecognised miscommunication is pervasive and insidious, resulting in many Aboriginal defendants being unfairly disadvantaged in police interviews’.²⁵⁶ As shown in Figure 4.13, the majority of Anangu interviewees reported that police do not use an interpreter when speaking with them. A failure to do is also a clear breach of the State interpreter policy framework mentioned earlier, and the *Anunga Guidelines*.²⁵⁷

Evidence reveals that cultural awareness training is critical, and this thesis suggests that greater use be made of trained interpreters and that police receive training to ensure they

²⁵⁴ Unlike practitioner prosecutors, police officer prosecutors are not officers of the court and must obtain leave of the court to appear as a prosecutor.

²⁵⁵ SAPOL, above n 13, 7 [4.2].

²⁵⁶ Cooke, above n 202, 26.

²⁵⁷ *R v Anunga* (1976) 11 ALR 412.

recognise when interpreting services *should* be used. There is also a need for a reappraisal of the Community Constable program.

The myriad of problems raised about current SAPOL policing practices demonstrates a systemic inattention to the intrinsic cultural needs of APY communities. These issues point to the need for a paradigmatic shift in the overall approach to policing practices on the Lands. This is addressed in chapter 6.

CHAPTER 5: THE ADMINISTRATION OF JUSTICE IN THE APY LANDS

INTRODUCTION

This chapter explores issues associated with the administration of justice on the Lands. Part 1 examines issues associated with the operation of State criminal courts in the APY Lands, followed by an examination of issues of court operations/procedures, court interpreters, community representation regarding sentencing options, and Aboriginal Sentencing (Nunga) Courts. It will also investigate issues of cross-cultural awareness by the court and its staff, and APY Anangu, and issues associated with the imprisonment of Anangu offenders far from their families and communities in mainstream prisons.

Part 2 provides a brief overview of the provision of legal representation for Anangu appearing before APY Courts from the 1970s to the late 1990s before dealing with contemporary representation services. It will critically examine issues related to client confidentiality and conflicts of interest, time and staffing limitations and the lack of continuity due to the frequent changes in attending lawyers. The effects of cultural differences will also be discussed from the perspective of cross-cultural awareness training, the use of interpreters, hearing problems, convenience pleas, and community representation in the court sentencing process.

The chapter explores the nature of the administration of justice in the Lands, assessing whether current approaches are adequate in meeting the requirements of justice in this cultural and social context and to identify scope for alternative measures, pointing to a need for a fundamental rethinking of the role of the courts on the Lands.

PART 1

I APY LANDS CRIMINAL COURTS

A brief historical overview of the APY Courts provides context and understanding of the issues that will be raised in this chapter. Prior to the late 1960s, offenders arrested in the then North West Aboriginal Reserve were conveyed hundreds of kilometres to the

Oodnadatta Police Station.¹ All matters were heard by the Oodnadatta Court of Summary Jurisdiction, usually comprised of two locally appointed Justices of the Peace. Offenders charged with minor matters were dealt with summarily by way of fines or short-term imprisonment. Those charged with more serious indictable offences were adjourned, and the offender usually remanded in custody to the Supreme Court Circuit at Port Augusta.

Between the 1970s and 1984, when the Marla police station was opened, Magistrates Circuit Courts in what is now the APY Lands was administered from the Oodnadatta Court of Summary Jurisdiction with the position of clerk of court being held by the officer in charge of that police station, who was also the police prosecutor.² Every four months an Adelaide magistrate would travel, usually by aircraft, to the communities in the Lands to hear matters relating to offences which had occurred in that region — courts sat at the then three major communities of Indulkana, Ernabella and Amata, and at least once a year at Kalka (near Pipalyatjara).³ Open-air sittings, sometimes under a tree during hot weather, were reasonably common, but at other times suitable larger community administration halls or buildings were used. It was not unusual to have dogs wandering through the court when it was sitting.⁴

In 1981, Anangu were granted inalienable freehold title to the 103 000 square kilometre APY Lands with the enactment of the *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act* (APY Land Rights Act).⁵ Driven by the APY communities themselves, regulations and by-laws under this Act created offences for the possession, consumption and sale of alcohol, certain forms of gambling, and for the prohibition of the inhalation

¹ See generally Aboriginal Customary Law Committee, 'Preliminary Report of the Aboriginal Customary Law Committee' (Adelaide, September 1979) <<http://www3.austlii.edu.au/au/other/IndigLRes/1979/7.pdf>>, 40–42.

² See generally Garry Hiskey, 'The North West Court Circuit (Pitjantjatjara Lands: A Personal Perspective' (circa 1992) *Aboriginal Justice Issues* 151, 159; see also Judith Worrall, 'European Courts and Tribal Aborigines - a Statistical Collection of Dispositions from the North-West Reserve of South Australia' (1982) 15 (March) *Australian and New Zealand Journal of Criminology* 47, 48; the officer in charge was also appointed as an Assistant Police Prosecutor.

³ Ibid.

⁴ Ibid 151; see also Garth Nettheim, 'Summary Jurisdiction on the Pitjantjatjara Lands' (1990) 2(45) *Aboriginal Law Bulletin* 4, 4; also, personal observations from my police posting to Oodnadatta from 1978 to 1980.

⁵ *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA).

or consumption of regulated substances.⁶ The latter included the supply and inhalation of petrol and the use of cannabis and other prohibited substances. Coinciding with the establishment of the Marla police station in 1984, police presence on the Lands increased with the creation of the Aboriginal Police Aide scheme in 1986, and the APY Land Rights Act regulations and by-laws were more regularly enforced. This resulted in more matters requiring prosecution and the introduction of the Magistrates Circuit Court (APY Court) presiding in the Lands every two months.⁷ At this time, the officer in charge of the Marla police station continued as clerk of the Marla Court of Summary Jurisdiction and also assistant police prosecutor. The position of clerk of court ended in 1996, with Port Augusta Magistrates Court assuming this administrative role. At about the same time, prosecution duties were taken over by the Port Augusta police prosecution branch.

The number of court circuits increased to eight times per year in 2004,⁸ but was reduced back to six circuits in 2014 due to a 25 per cent cut to the Courts Administration Authority annual budget.⁹ In a media release dated 23 October 2013, the Chief Magistrate, Judge Elizabeth Bolton, responded to concerns raised by the ABC Radio National that shortfalls in the number of APY Circuits would, in effect, be taken up by the use of ‘more audiovisual linking (video conferencing) between the Court and custodial institutions, thereby saving parties some time and expense usually incurred by having to travel long distances for (often) short court appearances.’¹⁰

⁶ Ibid s 43(3); *Pitjantjatjara Land Rights Act (Control of Alcoholic Liquor) By-Laws, 1987*, South Australian Government Gazette 18 June 1987, 1543-4; *Pitjantjatjara Land Rights Act (Control of Gambling) By-Laws, 1987*, South Australian Government Gazette 18 June 1987, 1544; *Pitjantjatjara Land Rights Act (Control of Petrol) By-Laws, 1987*, South Australian Government Gazette 18 June 1987, 1544-5; see also Hiskey, above n 2, 157.

⁷ Hiskey, above n 2, 152–159; see also Richard Bradshaw, ‘Community representation in criminal proceedings’ (1986) 11(12) *Legal Services Bulletin* 111, 111.

⁸ Lange Powell, ‘Statement of Lange Powell provided to State Coroner’ (3 November 2004) 15 (copy in my possession).

⁹ Media statement to ABC Radio National Law Report (APY Lands Circuit Court, 23 October 2013); see also Media statement to ABC Radio National Law Report (APY Lands Circuit Court, 28 October 2013) <<http://www.abc.net.au/radionational/programs/lawreport/cut-backs-to-circuit-courts-in-sae28099s-apy-lands/5068984>>.

¹⁰ Media statement to ABC Radio National Law Report (APY Lands Circuit Court, 23 October 2013); it is noted that the media statement makes no mention of the adverse impact video conferencing between courts and parties can have for procedural fairness, see, eg, Emma Rowden, ‘Distributed Courts and Legitimacy: What do we lose when we lose the courthouse?’ (2018) *Law, Culture and the Humanities*.

As mentioned, between the 1970s and mid-1990s, the administration of the APY Courts was primarily the responsibility of police at Oodnadatta, and then Marla from 1984. Police were also responsible for general police duties across vast distances which involved policing not only their local communities but also the widely-spread pastoral properties and communities within the APY Lands region. Policing such an area had its own unique problems without the onerous duties associated with prosecution and clerk of court responsibilities.¹¹ Officers were tasked with crime detection, the apprehension and reporting of offenders, the preparation of police briefs, the creation and management of court files, and the arrangements for each circuit court within the Lands communities. Officers also acted as court orderlies. At the completion of each circuit, police were then responsible for additional court work including the collection of fines and issuing warrants of apprehension for fine defaulters. The number of arrests for defaulters was quite high on the Lands, resulting in considerable time and effort expended in locating offenders, then transporting them to the Oodnadatta and later Marla police stations.¹² Both stations were then designated as police prisons where offenders could be held for up to 15 days. Those with default imprisonment terms greater than 15 days required transportation to the Port Augusta prison. Imprisonment for fine defaulters ceased in South Australia in 1999 with sweeping changes to the *Criminal Law (Sentencing) Act*.¹³ Those earlier decades posed an additional problem where the separation of powers was blurred with police often seen as being part of the administration of justice, a matter abrogated in 1996 when the APY Courts came under the administration of the Courts Administration Authority.

A *APY Criminal Courts Today*

The two resident magistrates at Port Augusta have prime responsibility for the conduct of the APY Courts, usually sharing the workload equally between them. The magistrate usually travels by aircraft, with overnight accommodation at Uluru and daily flights to and from the communities where courts are to be held.¹⁴ The magistrate is accompanied

¹¹ Personal experience with my Oodnadatta and Marla police postings in the 1970s and 1980s.

¹² Personal knowledge as then officer in charge at Marla in the mid-1980s.

¹³ *Criminal Law (Sentencing) Act 1988* (SA), Div 3 of Pt 9, as amended by the *Statutes Amendment and Repeal (Justice Portfolio) Act (No 42 of 1999)*.

¹⁴ See, eg, E P Mullighan, 'Children on Pitjantjatjara Yankunytjatjara (APY) Lands Commission of Enquiry: A Report into Sexual Abuse' (2008) 252.

by his clerk, often the court registrar, and sheriff's officers.¹⁵ The location for each court within the communities being visited is arranged beforehand by an Aboriginal Justice Officer (AJO) who travels to the Lands by vehicle (see Appendix A1.16–17). AJOs were established in 1998 with the introduction of new fines enforcement legislation.¹⁶ The AJO usually attends to the collection of the magistrate and staff from local aerodromes and is present during each court to liaise with defendants and communities. Police prosecutors are provided from Port Augusta, usually flying to the Lands by a SAPOL aircraft. Defence solicitors (generally from ALRM) travel by vehicle from Port Augusta. Each circuit commences on a Monday morning and continues for four days at four different communities. Courts are held at Indulkana, Mimili, Fregon, Ernabella and Amata. Pipalyatjara, the most remote of communities near the Western Australian border, is visited twice annually. Due to the higher number of matters, Indulkana is the only community visited on each circuit — see Figure 5.1:

Circuit 1 February	Circuit 2 April	Circuit 3 June	Circuit 4 August	Circuit 5 October	Circuit 6 December
Ernabella	Pipalyatjara	Ernabella	Ernabella	Pipalyatjara	Ernabella
Amata	Fregon	Amata	Fregon	Amata	Fregon
Fregon	Mimili	Mimili	Mimili	Mimili	Mimili
Indulkana	Indulkana	Indulkana	Indulkana	Indulkana	Indulkana

Figure 5.1 — 2018 APY Court circuit rotation (representative of most years)¹⁷

There are no formal courtroom facilities on the Lands.¹⁸ Instead, the court is held by arrangement in any suitable community building. Taking the court to the Lands is not just a matter of official scheduling but requires the Courts Administration Authority to engage in a regular balancing act between other special factors that include Indigenous cultural business, unpredictable weather and road closures.

¹⁵ Personal knowledge from attendances at APY Court circuits in 2015–16.

¹⁶ See Courts Administration Authority of South Australia Internet site, 'Aboriginal Justice Officers' <<http://www.courts.sa.gov.au/OurCourts/MagistratesCourt/Pages/Aboriginal-Justice-Officers.aspx>>.

¹⁷ Supplied by Paul Tanner, Aboriginal Justice Officer, Port Augusta Magistrates Court on 26 February 2018.

¹⁸ Nettheim, above n 4, 4.

1 *Conduct of APY Courts*

A comparison between APY Courts from prior to the early 1990s and current practice reveals a stricter adherence to the formality of the conduct of hearings and less tolerance of delays. During earlier decades, magistrates and defence solicitors usually dressed quite casually.¹⁹ It was rare to see court staff and lawyers wearing suits or even neck-ties. It was also commonplace for traditional elders to be present to provide advice to the court regarding community attitudes towards particular offending.²⁰ In 1978, Andrew Ligertwood, then a lawyer with ALRM, noted the importance of community representation before a court, where because ‘Europeans sit with little knowledge of tribal attitudes or other attitudes in the area it is impossible to sentence with a full understanding of the societal problem.’²¹

Former Magistrate Garry Hiskey reported that between 1988 and 1992, when he was the APY Court Magistrate, a lawyer was provided by the Pitjantjatjara Council as a supplement to individual defence lawyers. This community lawyer was ‘recognised by the court as having status or “locus” to appear before the court and make sentencing submissions, especially as to community attitudes about particular problems within the Lands and sometimes, but less often, about individuals.’²² Hiskey also reported that he drove to the Lands for APY Courts during the last two years of his term, an exercise which enhanced his ‘knowledge of the people and capacity to appreciate the issues which affect them.’²³

Today, APY Courts are conducted in a very formal manner, similar to those held in Adelaide and major regional centres. Magistrates and lawyers are more formally dressed in suits and neck-ties and some magistrates wear a black judicial gown.²⁴ Traditional elders are rarely invited to the proceedings and instead of a recognised

¹⁹ Bradshaw, above n 7, 112.

²⁰ Ibid – Bradshaw suggests this practice may have commenced in November 1992, but my own observations reveal it was commonplace in the late 1970s.

²¹ Ibid 114, citing Ligertwood, A L C, ‘The Pitjantjatjara and the law’, 1978, 35.

²² Hiskey, above n 2, 152; see also Andrew Collett, ‘Where has customary law been recognised and how?’ (2006) (29 July 2006) *SA Law Society Seminar: Aboriginal Customary Law* 7; see also Paul Bennett, *Specialist Courts for Sentencing Aboriginal Offenders in Australia* (Master of Laws Thesis, Flinders University, 2013) 22.

²³ Hiskey, above n 2, 153; see also Nettheim, above n 4, 4.

²⁴ Personal observations.

‘locus’ attending on behalf of the Pitjantjatjara Council, individual defence lawyers are expected to advise the court about community attitudes.²⁵

Hiskey also reported on the unpredictable length of time the court was held at each community and of the need for patience: ‘Inevitably, during the course of a court day, there are long delays. The lawyers take instructions only on the morning of the court sitting or on the night before. From a practical point of view, there is no point in starting the list until the lawyers have got instructions.’²⁶ This display of judicial patience is contrasted against today’s circuits, where it was observed that magistrates expect to commence sitting upon their arrival at a community, leaving very little time for lawyers to meet with and obtain adequate client instructions.²⁷

As discussed in chapter 4, the new police stations at Amata, Ernabella and Mimili included a courthouse, a planning matter criticised by the Mullighan Report because of its negative impact on the separation of powers.²⁸ However, these facilities have never been used and instead courts are held in whatever large office or small community building available on the day.²⁹ Court sessions are no longer held outdoors. The magistrate ‘sits at the head of a large table, flanked by support staff’.³⁰ Prosecutors, solicitors and an interpreter occupy the remaining space — the defendant is ‘often sandwiched in between.’³¹ Very little space is available for interested members of the public.³² What limited space that does remain is often occupied by police and correctional services personnel. These matters have always been dependent on the disposition of the sitting Magistrate rather than a matter of policy, but they are nonetheless typical of recent practice.

²⁵ Information obtained from one of three magistrates surveyed by me in 2016 and confirmed by personal observations during visits to the APY Court during 2015 and 2016.

²⁶ Hiskey, above n 2, 152.

²⁷ Personal observations from attending APY Courts in 2015 and 2016; see also Anna Bulman and Emily Sims, ‘The fight for justice in remote indigenous communities’ (2013) 34(7) (August) *The Bulletin: The Law Society of South Australia* 24.

²⁸ Mullighan, above n 14, 253.

²⁹ Bradshaw, above n 7, 112; APY Courts use the PY Ku (meaning ‘for Pitjantjatjara Yankunytjatjara people’) centres at Pipalyatjara, Amata and Mimili, and the TAFE centre at Ernabella — see generally The Anangu Lands Paper Tracker, *Recommendation 45: court facilities on the APY Lands* <<http://www.papertracker.com.au/archived/recommendation-45-court-facilities-on-the-apy-lands/>>.

³⁰ Bulman and Sims, above n 27, 24.

³¹ Ibid.

³² See Appendix 1, Figures A1.16–17, photographs of the Ernabella TAFE building used as the APY Court at Ernabella in October 2016.

2 APY Court Workload

It has been difficult to obtain statistical data specific to the APY Courts, but considering the remote locations of each court, Figure 5.2 reveals a relatively high workload for March 2015, April, August and September 2016 and is representative of the current workload experienced during each circuit. It should be noted that many of the matters involve multiple offences which are not shown in this data:

APY Court Location	No. of defendants Mar 2015	No. of defendants Apr 2016	No. of defendants Aug 2016 ³³	No. of defendants Sep 2016
Pipalyatjara	25	14	Not visited	20
Amata	45	23	42	37
Fregon	37	53	Not visited	25
Indulkana	51	70	64	46
Totals	158	160	NA	128

Figure 5.2 — Workload at various APY Magistrates Circuit Court, March 2015 to September 2016³⁴

For example, the figure of 70 persons listed at Indulkana reflects the high workload of prosecutors, lawyers and the court. It is particularly relevant given there is so little time to prepare and lawyers are faced with cross-cultural and language issues. While the data in Figure 5.2 provides an insight into the general workload of the court, some caution is required. Court lists are usually distributed to lawyers acting for APY defendants several days prior to the circuit. Amendments usually occur by the time of the actual court sitting, which are distributed by court staff on the morning of each court.

Although some historical data is available from Judith Worrall's 1982 research findings of offences prosecuted during North West Aboriginal Reserve circuit courts, her major data includes a breakdown of incidences of charges by offence categories, making it

³³ The APY Court Circuit in August 2016 visited Amata, Ernabella, Mimili and Indulkana — Pipalyatjara and Fregon were not.

³⁴ Compiled from APY Magistrates Circuit Court lists in my possession for March 2015 April 2016 and August 2016; data for September was supplied by Port Augusta AJO Jason Ngatokorua, April 2017.

impossible to compare with the number of cases shown in Figure 5.2.³⁵ Hiskey, however, provides APY Court data for four circuits from November 1991 to May 1992:

	Nov 1991	Feb 1992	Mar 1992	May 1992	Totals³⁶
Number of files [cases]	212	354	203	201	970 (100%)
Number of charges	314	584	249	246	
Total persons charged	150	178	125	147	
Persons who appeared	41	71	47	47	
Number of files represented by appearances	61	161	96	73	
Appearances as a percentage of non-appearance ³⁷	37%	40%	38%	32%	37% overall average

Figure 5.3 — Historical data — 1991–92 APY Courts³⁸

Shaded data in Figure 5.3 are files relating to a single defendant and contains total circuit results, offering a comparison with the total number of cases shown in Figure 5.2. As can be seen from this data, non-appearance of offenders was quite high.

More contemporary annual data, obtained from the Office of Crime Statistics and Research (OCSAR) and dealing with cases finalised by Port Augusta Court locations between January 2010 and December 2014, offers more accurate information (Figure 5.4). Data from the APY Courts is shaded:

Sitting location	2010		2011		2012		2013		2014	
	No.	%	No.	%	No.	%	No.	%	No.	%
Amata	49	2.2	61	2.5	87	3.1	51	1.8	37	1.5
Cooper Pedy	161	7.1	220	9.2	235	8.3	247	8.9	217	9.0
Ernabella	57	2.5	41	1.7	65	2.3	67	2.4	56	2.3
Fregon	24	1.1	27	1.1	47	1.7	40	1.4	32	1.3

³⁵ Worrall, above n 2, 49 (Table 1).

³⁶ The figures in this column have been added by me from the data presented by Hiskey, above n 2, 155.

³⁷ Hiskey, above n 2, 155 (this data is not included in the original Table 1 but extracted from the text).

³⁸ Ibid 155, Table 1.

Sitting location	2010		2011		2012		2013		2014	
	No.	%	No.	%	No.	%	No.	%	No.	%
Indulkana	86	3.8	100	4.2	119	4.2	96	3.5	60	2.5
Leigh Creek	22	1.0	29	1.2	29	1.0	16	0.6	8	0.3
Marla	7	0.3	10	0.4	9	0.3	13	0.5	5	0.2
Mimili	62	2.7	52	2.2	60	2.1	58	2.1	28	1.2
Pipalyatjara	14	0.6	15	0.6	23	0.8	12	0.4	19	0.8
Port Augusta	1,701	74.8	1,729	72.0	2,006	70.9	2,056	74.3	1,849	76.6
Roxby Downs	90	4.0	116	4.8	148	5.2	110	4.0	104	4.3
Totals (APY)	292		296		401		324		232	

Figure 5.4 — Cases finalised by Port Augusta Court locations, 2010 to 2014³⁹

A finalised case is defined as:

A case is a group of charges finalised in the same court on the same day involving a single defendant. Multiple defendants are counted as separate cases. Each retrial is counted as a separate case. Procedural hearings, appeals and applications are excluded. A finalised case is defined as a case where the outcomes of all charges have been finalised.⁴⁰

Although the data in Figures 5.2 to 5.4 offer some insight into the high workload of APY Courts, an accurate longitudinal study has not been possible due to the unavailability of consistent data. However, the cases reported by Hiskey in Figure 5.3 reveals a larger number of offenders during his sample period from November 1991 to May 1992 compared with more contemporary courts.

As will be discussed later in this chapter, trials are no longer heard by APY Courts but adjourned for hearing at the Coober Pedy Magistrates Circuit Court. For this reason, it can be assumed that the details contained in Figure 5.3 are, in the main, the results of

³⁹ Office of Crime Statistics and Research, 'Port Augusta Court Statistics' (South Australian Attorney-General's Department, February 2016) 1.

⁴⁰ Ibid 10 (Definitions).

defendants pleading guilty to either the original charge or one that may have been plea-bargained between defence lawyers and prosecution.

Not shown in Figure 5.4 are the often-large numbers of defendants who do not appear in court. Reasons for non-appearance are often due to cultural factors — attending and participation in culturally significant events for Anangu takes priority over attending court.⁴¹ Other reasons include the inability of police to serve a summons on a reported offender due to the vast area and numbers of communities on the Lands.⁴² Figure 5.3 reveals the extent of the non-appearance problem and although the data is nearly three decades old, it is nevertheless relevant to APY Courts today and is a matter to be discussed more fully below.

3 Defendants by Gender

The 1992 statistics provided by Hiskey does not include a breakdown in defendants by gender.⁴³ However in 1986, Richard Bradshaw observed that ‘defendants [in the APY Courts] are almost exclusively male’,⁴⁴ unlike the situation today as shown in Figure 5.5:

APY Court Location	Males Apr 2016	Females Apr 2016	% females to males
Pipalyatjara	9	5	56%
Amata	18	5	28%
Fregon	46	7	15%
Indulkana	49	21	43%
Totals	122	38	32%

Figure 5.5 — Defendants by gender, APY Magistrates Circuit Court April 2016⁴⁵

The types of offences allegedly committed by females as shown above range from serious assault, possession of liquor and/or drugs, damage to property and traffic

⁴¹ Hiskey, above n 2, 155.

⁴² Ibid 155–6.

⁴³ Ibid 151–166.

⁴⁴ Bradshaw, above n 7, 112.

⁴⁵ Compiled from APY Magistrates Circuit Court lists in my possession for April 2016 — females were identified from their gender-specific names.

matters.⁴⁶ This increase in Aboriginal female offending appears to be consistent with the 2015 findings of MacGillivray and Baldry.⁴⁷ They found that lifestyle factors, including problematic alcohol and drug use and financial social stress were among some of the reasons.⁴⁸ They also pointed to ‘other contextual factors including visibility and number of police patrolling Indigenous communities compared with communities where few Indigenous people live.’⁴⁹ As mentioned in chapter 4, increased permanent policing presence in the Lands commenced in 2008 with the introduction of the fly-in, fly-out (FIFO) arrangement. Other than to highlight the increase in Aboriginal females appearing before APY Courts, a full discussion on the specific reasons is beyond the scope of this thesis.

II CURRENT ISSUES — APY CRIMINAL COURTS

My interviews with Anangu and magistrates in 2016 illustrate several key problems relating to the operation of the APY Court. A wider field of research sources reveals a related set of issues.

A *Rushed Nature of APY Courts*

Unlike the more leisurely (but time-consuming) nature of APY Courts held in the 1970s to at least the 1990s as reported by Hiskey and mentioned previously, today’s courts are more rushed. My observations in 2015 and 2016 reveal that as soon as the magistrate arrives each morning at a community there is an expectation of commencing immediately after the court staff are organised. Lawyers and prosecutors generally drive to each community, usually arriving a short time before the magistrate. Because of this, very little time is available for disclosure of police allegations and for ‘the negotiation of pleas of guilty on an informed and satisfactory basis.’⁵⁰ As will be discussed, this also leaves lawyers limited time to obtain proper and detailed instructions from their Anangu clients.

⁴⁶ Ibid.

⁴⁷ Peta MacGillivray and Eileen Baldry, ‘Australian Indigenous Women's Offending Patterns’ (2015) Brief 19 *Indigenous Justice Clearing House* 1–12.

⁴⁸ Ibid 1.

⁴⁹ Ibid 11, citing C Cunneen, *Conflict, Politics and Crime: Aboriginal Communities and the Police*, (Allen and Unwin, 2001).

⁵⁰ Mullighan, above n 14, 252.

The 2008 Mullighan Report found that ‘the judicial system on the Lands have [sic] worked under extreme difficulties for many years.’⁵¹ Reasons include the inadequate facilities for the magistrate and court staff, limited facilities for police handling defendants remanded in custody or sentenced to imprisonment, and no facilities for lawyers to interview clients.⁵² The Report also raised serious concerns about the quality of justice in the Lands: ‘Are some cases under-prosecuted or under-defended in order to obtain a result in the allotted time? Is the sentencing process undertaken without the opportunity to provide all relevant information by prosecution and defence, and appropriate time for reflection by the magistrate?’⁵³ The Report added: ‘In all cases there must be adequate time and facilities for the taking of instructions, proofing witnesses, negotiations and preparation.’⁵⁴ My observations and surveys with lawyers reveal that nothing has changed since these observations were made in 2008.

Magistrates however, are time-poor as both share judicial duties at not only Port Augusta but also at the Whyalla Magistrates Court and the Coober Pedy Circuit Court, which sits every two months. Other factors that increase the time pressure on the Court are the distance between the communities on the Lands and the fact that only four days are set aside for each APY Court circuit. These factors are obviously reasons why magistrates utilise air travel to, from and within the Lands. There are exceptions, where one of the three magistrates surveyed in 2016 stated that they had used motor vehicles and stayed overnight at Umuwa during the court circuit. Other magistrates stay overnight at Uluru in the Northern Territory and fly to the community hosting the Court each day. However, even when magistrates do stay overnight at Umuwa, the administrative centre of the Lands, other than travelling to Ernabella and Fregon (30 and 35 kilometres respectively from Umuwa), substantial travelling time is required to visit other communities where the court is to be held.⁵⁵ The end result, though, still sees the magistrate arriving at the court only on the morning of each court day.

The rushed nature of the courts and the lack of time available to lawyers to obtain full instructions could result in a matter being adjourned, which may have serious

⁵¹ Ibid.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ See Figure 3.1, chapter 3 of this thesis for travelling times between communities on the Lands.

ramifications regarding penalty discounts available to defendants who plead guilty early.⁵⁶ Moreover, the cycle of court appearances leads to a waste of resources and are indicative of a dysfunctional system, one that is attempting to apply Western judicial practices to a completely different environment. These matters are discussed more fully in Part 2 of this chapter and in chapter 6.

B Hearing Delays (Adjournments)

The rushed nature of the APY Courts and the lack of time for negotiations between prosecutors and defence lawyers, and the inability of lawyers to obtain proper instructions from clients, often result in matters being adjourned to the next circuit. Other reasons include the non-appearance of defendants as previously discussed.

1 General Delays

To a certain extent, the delays are also reflected in Figure 5.6 below, comparing the number of defendants appearing for the first time with matters adjourned from previous court sittings. This data has been obtained from the April 2016 APY Court list in my possession.

APY Court	GEN ⁵⁷	FIA ⁵⁸	Totals
Pipalyatjara	8 (57%)	6 (43%)	14 (100%)
Amata	14 (61%)	9 (39%)	23 (100%)
Fregon	23 (43%)	30 (57%)	53 (100%)
Indulkana	35 (50%)	35 (50%)	70 (100%)
Totals	80 (50%)	80 (50%)	160 (100%)

Figure 5.6 — Cases adjourned from previous court Vs first appearance, April 2016 circuit⁵⁹

The reasons for the 50 per cent of matters to be heard which were adjourned from a previous court are not shown on the relevant court lists and could include, as discussed,

⁵⁶ See *Criminal Law (Sentencing) Act 1988* (SA) s 10B.

⁵⁷ GEN — abbreviation used in the court list to indicate matters which were adjourned from a previous court sitting.

⁵⁸ FIA — abbreviation used to indicate the first appearance before the court.

⁵⁹ This data has been obtained from the APY Court list for April 2016 and in my possession.

attendance at culturally significant ceremonies. Other reasons include matters where summonses have not been served by police or proof of service of summonses was not available. It could also mean that an adjournment had been sought by defence lawyers, possibly to obtain more complete instructions or to negotiate further with the prosecution; or it could be that the prosecution has requested an adjournment due to insufficient time since the commission of an offence for all evidence to be gathered and to fully prepare a matter for prosecution.

The data in Figure 5.6 does, however, show that there are delays in an average of 50 per cent of matters heard before APY Courts, indicating an improvement when compared with Hiskey's data in Figure 5.3 showing an overall circuit average of 32 per cent defendant attendance, or an overall non-attendance average of 64 per cent.⁶⁰ The reasons for this improvement in attendance is not known but may be related to the pre-hearing work conducted by Aboriginal Justice Officers and the assistance provided by Aboriginal Field Officers employed by ALRM who attend the circuits. Non-attendance can result in either an adjournment to the next court sitting date or an arrest warrant being issued.

An approximation of delays caused by adjournments for April 2016 shown in Figure 5.6 can be obtained by referring to the court list file numbers.⁶¹ In April 2016, of the eight adjourned matters shown for the Pipalyatjara Court, five matters (63 per cent) related to those which commenced in 2015. Pipalyatjara, Ernabella, Fregon and Mimili are only visited every second circuit, on average every four months. This means that the five matters from 2015 had been in progress for between four and 16 months. The April 2016 court list also reveals that at Indulkana 16 matters were commenced in 2015, one in 2014 and another in 2013. The last two (2013 and 2014) appear to represent extremely lengthy delays. They pose problems for defendants having to wait such a long time for minor matters to be resolved. The offences continue to hang over their heads. They know they must attend the Court at some point, which may be a cause for

⁶⁰ See also Nettheim, above n 4, 4.

⁶¹ For example, MCPAU 16 196. MCPAU refers to the Port Augusta Magistrates Court (which includes the APY Court), and the two-digit number following (16 in this example) represents the year the action commenced.

anxiety, and may be a reason why some Anangu simply plead guilty at the earliest opportunity and be done with the matter.

As reported by Bill Edwards, Western concepts of time (and distance) can be difficult for some Pitjantjatjara, where time, for example, generally ‘has to be expressed in relation to known events, for example, “before Christmas” or “after the football weekend”’.⁶² During my police postings to the Lands, I was well aware of these difficulties and also that for many Anangu defendants there was a belief that once they had attended a court, the matter was then finished, demonstrating limited knowledge of the justice system. When viewed against the graph in Figure 5.7, where nine Anangu participants (28 per cent) indicated that they did not understand the court proceedings and a further 13 (40 per cent) stated that they understood only a little, it appears that confusion over time and the lack of understanding of court processes may still exist.⁶³ This conclusion is further supported by the finding with respect to language described later in this chapter.

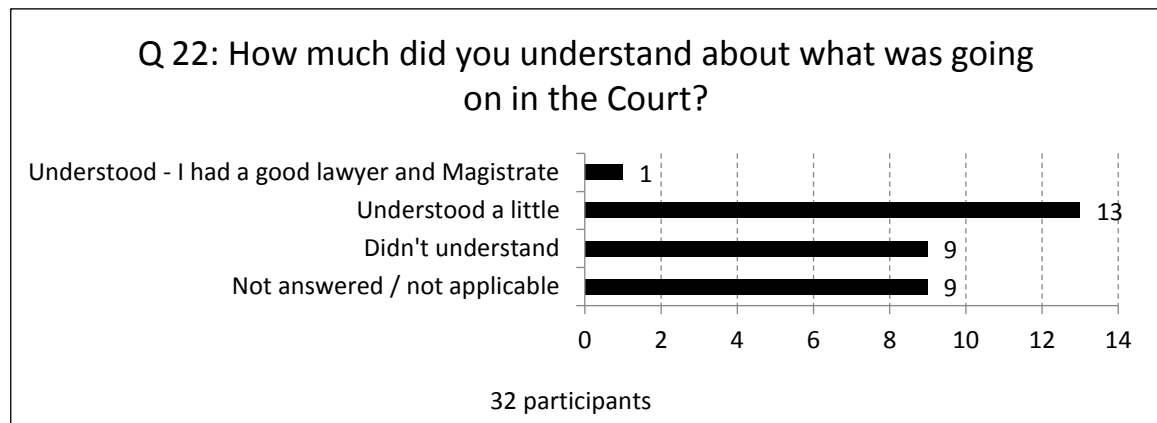


Figure 5.7 — 2016 survey with APY Anangu

2 Adjournment of Trials to Coober Pedy

Historically, the majority of matters heard by APY Courts were guilty pleas. Trials for not guilty pleas, while uncommon, were held on the Lands but were often problematic due to time constraints and the regular non-appearance of defendants or witnesses,

⁶² Bill Edwards, ‘Putuna Kulilpai: Interpreting for Pitjantjatjara people in courts’ (1999) 14 *Journal of Judicial Administration* 99, 106.

⁶³ See generally Michael Esposito, ‘Lack of Cultural Support to Aboriginal Communities an “Appalling Situation”’ (2015) 37 (October) *The Bulletin: The Law Society of South Australia* 12.

adding further to delays.⁶⁴ From 2012, as a result of a decision by the Courts Administration Authority, all matters listed for trials during APY circuits have been adjourned to the Coober Pedy Magistrates Circuit Court, which sits every two months. While there were no doubt sound administrative reasons for this change, the tyranny of distance has resulted in not only delays but also inconvenience to Anangu and may provide an incentive to plead guilty to avoid a trial.

Coober Pedy is located on the Stuart Highway, 230 kilometres south of Marla on the eastern boundary of the Lands, and nearly 300 kilometres south of Iwantja (Indulkana), the nearest APY Land's community. Other Lands communities are even further distant: Mimili – 366 kilometres (732 kilometres return): Kaltjiti (Fregon) – 430 kilometres (860 kilometres return): Pukatja (Ernabella) – 500 kilometres (1000 kilometres return): Amata – 635 kilometres (1270 kilometres return): and Pipalyatjara – 840 kilometres (1680 kilometres return). There is no public transport available between Coober Pedy and Lands' communities. While police will usually arrange transport for any witnesses required to attend the Coober Pedy Court, defendants (and their families) are required to provide their own. At best, the return visit to the Court from Iwantja involves a distance of 600 kilometres, while at worst a defendant from Pipalyatjara has a 1680-kilometre return trip. To place these distances in context, a return road journey from Adelaide to Melbourne is 1460 kilometres — and public transport is readily available. For a defendant from Pipalyatjara, a return trip to Coober Pedy is greater than the distance by road from Adelaide to Sydney (1375 kilometres).

In addition to the cost of private transport, defendants would also incur accommodation and other costs. Anangu witnesses can recoup any costs they incur from payment of witness fees by the court. Importantly, however, besides the costs and travelling involved for Anangu trial defendants, there are delays due to adjournments.

These issues are evident in the case of *Police v Renita Ken*.⁶⁵ Ken was charged with aggravated assault of a police officer in 2016 at Amata. The initial hearing was at Amata on 7 February 2017 where the defendant pleaded not guilty. The matter was

⁶⁴ Personal experience.

⁶⁵ *Police v Renita Ken* 2016 (unreported Port Augusta Magistrates Court file PAUMC 16 2077, heard at Coober Pedy 25 May 2017).

adjourned for trial at the Coober Pedy Court and was part heard on 24 May 2017 and subsequently adjourned for sentencing to the Port Augusta Magistrates Court on 22 June 2017. The defendant lived at Amata, requiring a return trip to Coober Pedy of 1270 kilometres.

In answering a question about the appropriateness of trials at Coober Pedy, the three magistrates surveyed in 2016 all stated that there were time constraints during the APY circuit and there were no appropriate facilities available on the Lands. Only one acknowledged the difficulties for defendants who have to travel extensive distances and being away from their community and family.⁶⁶

These issues raise serious questions about the administration and delivery of justice for APY Anangu. The costs involved in exercising a right to a fair trial for Anangu, if the offence carried only a fine, could possibly exceed any penalty imposed if found guilty. Under these circumstances, there is a clear incentive for defendants to enter a plea of guilty for the sake of convenience, compromising their legal rights.

C *Court Interpreters*

Where the native language of witnesses who are to give oral evidence in any court proceedings is not English and they are not reasonably fluent in English, they are entitled to give evidence through an interpreter.⁶⁷ The right of a court to exclude evidence improperly obtained is contained within the common law and in statute.⁶⁸

While the problems associated with culture and language relevant to policing issues were described in chapter 4 of this thesis, they are also relevant to court hearings involving APY Anangu.⁶⁹ The Port Augusta Magistrates Court utilises Pitjantjatjara interpreters supplied by Multilingua South Australia⁷⁰ but these interpreters are no

⁶⁶ Answers to question 30 of a survey of magistrates involved (or recently so) in the APY Courts; survey conducted by me in 2016.

⁶⁷ *Evidence Act 1929* (SA) s 14(1).

⁶⁸ See, eg, *Bunning v Cross* (1978) 141 CLR 54; see also *Evidence Act 1929* (SA) s 14.

⁶⁹ See generally Edwards, above n 62.

⁷⁰ Multilingua Pty Ltd, 230 Angas Street, Adelaide, South Australia ((08) 8232 6696).

longer used in the APY Courts — instead, they are provided by the Northern Territory Aboriginal Interpreter Service (NTAIS) based at Alice Springs.⁷¹

1 *Historical Context*

Interpreters have been used in the APY Courts since at least the 1970s and have, in the main, continued today. During earlier decades, interpreters were usually sourced from within a community at which the court was being held. Although Bradshaw referred to the use of interpreters during the 1980s, how they were recruited is not known.⁷² Garth Nettheim accompanied Magistrate Hiskey on an APY circuit in May 1990 and reported that ‘[a]lthough the need for interpreters has been recognised as a priority for years, apparently this was the first time an interpreter covered the circuit.’⁷³ During my prosecution work before APY Courts during the 1970s and mid-1980s, Bill Edwards, then a pastor and fluent Pitjantjatjara speaker in the APY Lands, was often called upon to interpret during circuit courts.⁷⁴ When he was not available, the use of interpreters was ad hoc, and if needed were sourced from senior Anangu men and women within each community. Edwards reported that in 1977, a Court Interpreting Service was established ‘within the Attorney-General’s Department ... incorporated into the Ethnic Affairs Branch. It is now known as the Interpreting and Translating Centre within the Multicultural and Ethnic Affairs Commission.’⁷⁵

2 *Present Situation*

Today, as reported by one of three magistrates surveyed in 2016, APY Court interpreters are sourced from either the NTAIS or from the SA Interpreting and Translator Centre.⁷⁶ All three surveyed magistrates stated that they used interpreters when on court circuit, with some clarification:

⁷¹ Interview with Jason Ngatokorua, Aboriginal Justice Officer at Port Augusta (telephone interview, 27 April 2017).

⁷² Bradshaw, above n 7, 113.

⁷³ Nettheim, above n 4, 4.

⁷⁴ Edwards, above n 62, 103.

⁷⁵ Ibid.

⁷⁶ See Government of South Australia Interpreting and Translator Centre Internet site <<http://www.translate.sa.gov.au/home>>; however, telephone contact with this centre by me on 27 April 2017 revealed that they no longer provide interpreting services for Aboriginal languages.

1. One mentioned their use ‘when defendants possibly have trouble understanding court proceedings in English’;
2. Another mentioned the use of interpreters ‘when defendants request an interpreter’ and ‘when defendants demonstrably have trouble understanding court proceedings’;
3. The third agreed with the above, and added, ‘But most defendants are represented. The Court expects representatives to address this issue.’⁷⁷

When interpreters are not available from these sources, the court makes use of those ‘available from any source.’⁷⁸ As reported to me by an AJO who attends the APY Court circuits on a regular basis, it is Court Administration Authority policy that an interpreter should be present at each court.⁷⁹ However, it was noted that when I attended the APY Court at Ernabella in August 2016, an interpreter from the NTAIS was unavailable and the presiding magistrate made use of local community members when needed. As will be discussed, it is important that the decision to use an interpreter for Anangu defendants should be a matter of policy by the magistracy and legal representatives and that the decision be made based on a sound understanding of Anangu culture.

Data in Figure 5.8 reveals that of the 32 Anangu survey participants, 23 (72 per cent) had appeared before the APY Court some time during their lives (APY Courts have jurisdiction over Family Court matters).

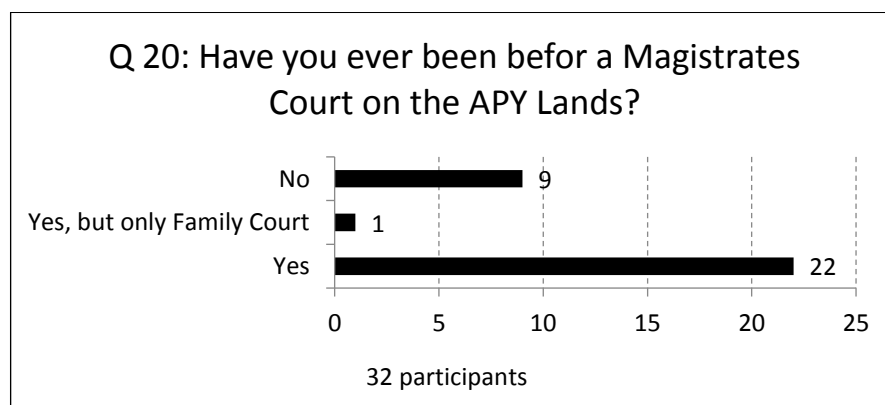


Figure 5.8 — 2016 survey with APY Anangu

⁷⁷ Results of survey of magistrates conducted by me in 2016 (question 19).

⁷⁸ Ibid, a response to question 18 from one of the three magistrates surveyed.

⁷⁹ Interview with Jason Ngatokorua, Port Augusta Aboriginal Justice Officer (telephone interview, 4 May 2017).

Figure 5.9 reveals that 13 participants (40 per cent) stated they did not have an interpreter with them in the court. Not shown in the graph is that all 13 were Anangu who spoke Pitjantjatjara as a first language and their knowledge of English was limited.⁸⁰ It is acknowledged that no time-frame regarding when a person appeared before an APY Court is available from these interviews.

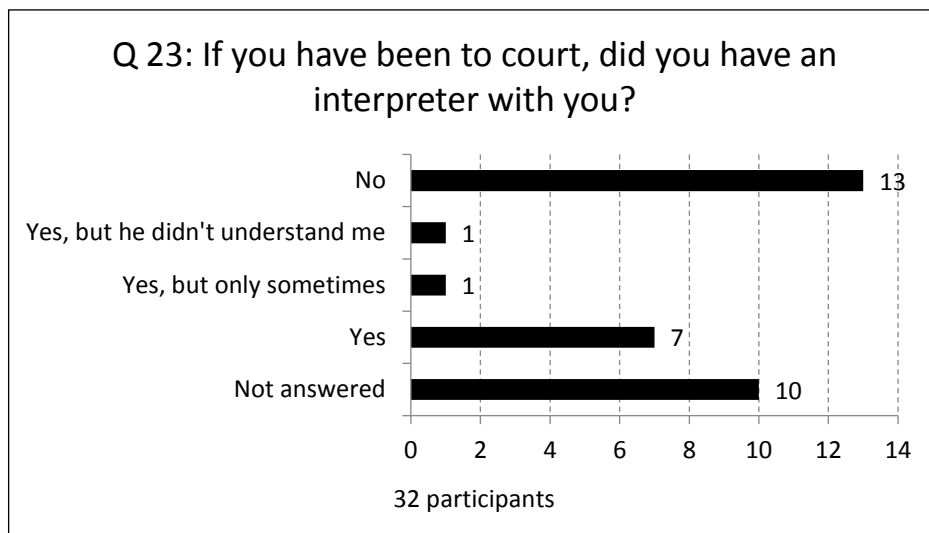


Figure 5.9 — 2016 survey with APY Anangu

Nevertheless, the data in Figure 5.9 reveals that there remains a gap in the provision of suitable and well-trained interpreters for Anangu appearing before the APY Court. The need for interpreters can also be gleaned from the fact that during my 2016 interviews with Anangu, of the 32 participants, 19 (60 per cent) had difficulty understanding English. Twelve interviewees (38 per cent) appeared to understand most English words but spoke Aboriginal English, and only one person was judged to be fluent in English.⁸¹ Although these observations were subjective, being based on my own experience and elementary knowledge of Pitjantjatjara, they are nonetheless important. My research interviews were conducted under informal, friendly and voluntary circumstances, and in locations where participants were under no pressure, unlike those associated with an adversarial court process.

⁸⁰ Observations made by me during the 2016 survey process.

⁸¹ See chapter 3; see also chapter 3, Figure 3.1.

3 *The Importance of Court Interpreters*

Article 14 of the International Covenant on Civil and Political Rights (ICCPR),⁸² describes basic rights to a fair trial and includes, inter alia, that the defendant, ‘[i]n the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality’;⁸³ ‘[t]o be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him’;⁸⁴ and ‘[t]o have the free assistance of an interpreter if he cannot understand or speak the language used in court.’⁸⁵ Although Article 14 of the ICCPR has been incorporated into the *Australian Human Rights Commission Act*,⁸⁶ the Australian Human Rights Commission has limited statutory authority by which to enforce breaches of the Convention. In *Dietrich v The Queen*,⁸⁷ the right to a fair trial was described as ‘a central pillar of our criminal justice system’.⁸⁸

From a South Australian perspective, and specifically so for an APY Lands Anangu defendant, in *Frank v The Police*⁸⁹ Sulan J stated: ‘It is a fundamental right which must be afforded to all defendants who face criminal prosecutions to have an interpreter who can explain the nature of the proceedings and ensure that a defendant understands what is being said in court.’⁹⁰ He further stated:

A failure to afford a defendant an interpreter, in circumstances where the defendant cannot understand the proceedings, will render proceedings unfair. If the Court is unable to provide an interpreter and the defendant is, therefore, unable to receive a fair hearing, the Court possesses the power to stay the proceedings.⁹¹

Frank was a case where the Anangu defendant had pleaded guilty before a Magistrates Court and subsequently successfully appealed to the SA Supreme Court on the grounds that the penalty was manifestly excessive and that ‘the Learned Sentencing Magistrate

⁸² *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14.

⁸³ *Ibid*, art 14.3

⁸⁴ *Ibid*, art 14.3(a).

⁸⁵ *Ibid*, art 14.3(f).

⁸⁶ *Australian Human Rights Commission Act 1988* (Cth) pt III, sch 2.

⁸⁷ *Dietrich v The Queen* (1992) 177 CLR 292.

⁸⁸ *Ibid* 298 (Mason CJ and McHugh J).

⁸⁹ *Frank v Police (SA)* [2007] SASC 288.

⁹⁰ *Ibid* [70].

⁹¹ *Ibid*, citing *Gray v Police* (2003) 85 SASR 1; *Ferguson v Reid* [2005] SASC 240.

failed to provide the appellant with sentencing remarks at the time of sentence.’⁹² Despite a statutory requirement for a court to provide reasons for sentencing,⁹³ in *Frank* the reasons for not doing so were due to the defendant’s lack of English and the repeated failure to obtain a Pitjantjatjara interpreter during the many adjournments of this matter, including at the time of sentencing.⁹⁴

Generally, all witnesses providing sworn evidence before a court must do so under either an oath or an affirmation.⁹⁵ Section 14 of the *Evidence Act*⁹⁶ provides for an interpreter for matters ‘where the native language of a witness who is to give oral evidence in any proceedings is not English; and the witness is not reasonably fluent in English.’⁹⁷ A person acting as an interpreter before a court may only do so if the person takes an oath or makes an affirmation to interpret accurately.⁹⁸ However, during my prosecution duties before APY Courts in the 1970s and 1980s, and again from observations in the APY Courts, the Coober Pedy Circuit Court and Port Augusta Magistrates Court in 2015–16, I have never seen an interpreter’s oath or affirmation administered to an Aboriginal language interpreter. Conversely, on several occasions I have seen oaths or affirmations administered for interpreters of immigrant languages.⁹⁹ While a court is not bound by the rules of evidence when determining a sentence,¹⁰⁰ it appears some laxity applies to Aboriginal language interpreters and the need for an interpreter’s oath.

The importance of a court interpreter for APY Courts was commented on by the 2008 Mullighan Report: ‘The criminal justice system has long been vexed by the lack of suitable interpreters in matters involving Aboriginal people and Anangu in particular. Interpreters with appropriate knowledge, skill, training and experience are required in numbers as a matter of urgency.’¹⁰¹ In their 2014 Annual Report, the Aboriginal Legal

⁹² Ibid [41].

⁹³ *Criminal Law (Sentencing) Act 1988* (SA) s 9.

⁹⁴ *Frank v Police* (SA) [2007] SASC 288, [39].

⁹⁵ *Evidence Act 1929* (SA) s 6.

⁹⁶ *Evidence Act 1929* (SA).

⁹⁷ *Evidence Act 1929* (SA) s 14(1)(a) and (b).

⁹⁸ Ibid s 14(1a).

⁹⁹ See also Esposito, above n 63, 12.

¹⁰⁰ *Criminal Law (Sentencing) Act 1988* (SA) s 6.

¹⁰¹ Mullighan, above n 14, 248.

Rights Movement (ALRM) reported that '[t]he Court system continues to malfunction in the lack of provision of interpreters in all Courts.'¹⁰²

Despite the recommendations of the 2008 Mullighan Report, the question of using interpreters with 'appropriate knowledge, skill, training and experience' remains a problem in today's APY Courts.¹⁰³ This problem is highlighted in Figure 5.7 where 68 per cent of Anangu interviewees had little or no understanding of court procedures in which they were involved. Even though the Courts Administration Authority considers the provision of an APY Court interpreter standard policy, there are several factors that create everyday obstacles to its effectiveness.

(a) *Suitability of NTAIS Aboriginal Language Interpreters*

Aboriginal language interpreters employed by the Northern Territory Aboriginal Interpreting Service (NTAIS), and generally used by APY Courts, are required to comply with the Australian Institute of Interpreters and Translators Inc (AUSIT) Code of Ethics.¹⁰⁴ The Code of Ethics covers matters of confidentiality, impartiality, accuracy, professional conduct, and competence.¹⁰⁵ To be selected as an interpreter, the applicant must sit for a language test, complete an induction course and attend ongoing training courses. Aboriginal interpreters may enrol in a Diploma of Interpreting through the Northern Territory Bachelor Institute of Indigenous Tertiary Training. They may also sit for accreditation tests with the National Accreditation Authority for Translators and Interpreters (NAATI).¹⁰⁶ According to NAATI, those seeking to be interpreters for work in law require, at a minimum, Professional Interpreter accreditation.¹⁰⁷

Miscommunication within the justice system:

¹⁰² ALRM, 'Aboriginal Legal Rights Movement Inc: Annual Report 2013/14' (Aboriginal Legal Rights Movement Inc, 2014) 29.

¹⁰³ Mullighan, above n 14, 249 (Recommendation 42).

¹⁰⁴ Australian Institute of Interpreters and Translators Inc, 'AUSIT Code of Ethics and Code of Conduct' (2012)

<http://ausit.org/AUSIT/About/Ethics___Conduct/Code_of_Ethics/AUSIT/About/Code_of_Ethics.aspx>.

¹⁰⁵ See Northern Territory Aboriginal Interpreter Training Internet site:

<<https://nt.gov.au/community/interpreting-and-translating-services/aboriginal-interpreter-service/aboriginal-interpreter-training>>.

¹⁰⁶ Ibid; see also National Accreditation Authority for Translators and Interpreters (NAATI) Internet site:

<<https://www.naati.com.au/information/accreditation/>>.

¹⁰⁷ Ibid (NAATI Internet site).

is insidious when unrecognised — such as misunderstood questions or misinterpreted answers ... [resulting] in many Aboriginal defendants being unfairly disadvantaged (or indeed, sometimes advantaged) in police interviews, in instructing counsel, in giving evidence and understanding trial proceedings.¹⁰⁸

As a then trainer of NTAIS Aboriginal interpreters, Michael Cooke noted that when providing an NTAIS interpreter for police and court work, ‘some interpreters are well prepared to undertake their assignments. Others, unfortunately, are not adequately prepared at all and, [in his] experience, sometimes are known to be not ready when they are despatched to their assignment.’¹⁰⁹ He further noted that in 2009, there were 300 registered NTAIS interpreters, ‘of whom one-quarter are accredited.’ He also noted that of that number, only a minority have completed a Diploma of Interpreting: ‘But most have done so through short test preparation workshops of a few days or a week, followed by taking NAATI’s oral test.’¹¹⁰

Given that enrolment in a Diploma of Interpreting course and accreditation with NAATI appear to be aspirational objectives, and that NAATI require at least Professional Interpreter accreditation (ie, requiring at least a Diploma of Interpreting) for those working in the law, just how well-trained and suitable are NTAIS interpreters used by the APY Courts? Cooke addressed this question by stating:

While an interpreter service would naturally wish to send an interpreter who is known to be competent, they are not always available and notice can sometimes be very short. The question this raises is whether it is better to send an interpreter who is not up to the task or not to provide an interpreter at all. (The author’s own answer is the latter.)¹¹¹

This poses a further problem, one of delays to court proceedings through adjournments where an interpreter is not available, adding to the problems with APY Courts as previously discussed.

Cooke identified several possible issues associated with using Aboriginal people as interpreters. These include using a prisoner’s friend in the dual role as a friend and

¹⁰⁸ Michael Cooke, ‘Anglo/Aboriginal communication in the criminal justice process: A collective responsibility’ (2009) 19 *Journal of Judicial Administration* 26, 26.

¹⁰⁹ Ibid 33.

¹¹⁰ Ibid.

¹¹¹ Ibid.

interpreter because of a conflict of interest, even when that friend is a trained interpreter. Others include reluctance by even competent interpreters who may refuse to work in serious cases due to a fear of cultural or familial retribution.¹¹² An Aboriginal interpreter may also suffer from gratuitous concurrence and if they have limited English skills and speaking only Aboriginal English, they are likely to be influenced by their first language to the same degree as the person they are assisting.¹¹³

The question of Aboriginal interpreter competency was raised in March 2015 when I was acting for ALRM clients at Amata during the APY circuit court at that time. My work involved taking instructions from Anangu clients on the morning of the Amata Court. Available to assist me was the court-appointed Pitjantjatjara interpreter, a young Anangu man from Amata and newly appointed as a qualified interpreter from the Alice Springs NTAIS. While obtaining instructions from a large number of clients he appeared to be fluent in Pitjantjatjara, but his interpreting skills left much to be desired. The problems observed included inaccurate interpretation and a tendency to elaborate on answers provided by clients, a strong impression that he was labouring under the effects of gratuitous concurrence with his interaction with me, and possibly influenced by cultural obligations due to him being a local Amata Anangu man.

(b) Shared use of NTAIS Interpreters

As already mentioned, and to be further examined in this chapter, there is an expectation that NTAIS interpreters used during APY Courts are shared between the court, defence lawyers and other agencies involved in circuit work. SAPOL, ALRM and private lawyers, and other agencies involved in the court process do not employ or utilise their own interpreters during investigations or obtaining client instructions, or when advice of court outcomes is provided to Anangu clients. Due to the rushed nature of the APY Court, the workload of an APY Court appointed interpreter is high enough without being required to perform additional interpreting tasks, a matter which is far from satisfactory, disadvantaging all involved, and Anangu in particular.

¹¹² Ibid 32.

¹¹³ See generally *ibid*.

The shared use of interpreters raises other issues, particularly the difficulties of interpretation in the legal context where an interpreter, not trained in the law, may not understand the context in which they are interpreting. These situations include the knowledge of legal terms used in courts by magistrates, the prosecution and defence lawyers, and those made by police outside the court environment during initial investigations.

The criminal justice systems encountered by Anangu are conducted in formal English, often containing legalese, and the issues associated with interpreters indicates the broader issue of requiring Anangu to fit into a foreign system of criminal justice, not only in terms of the norms of behaviour, but also in terms of the means through which people must account for their behaviour. They are issues which point to a need for a fundamental rethinking of the role of the courts on the Lands and will be discussed in detail in chapter 6.

D *Aboriginal Sentencing (Nunga) Courts*

To provide a more culturally appropriate court setting for Aboriginal people than those in existing Magistrates Courts, and one based on conferencing and circle sentencing principles, the Courts Administration Authority adopted a separate Aboriginal Court environment.¹¹⁴ Originally an initiative of Magistrate Chris Vass in 1999, and continuing today, the Nunga Court has proved to be a successful alternative for Aboriginal offenders.¹¹⁵ South Australia was the first to introduce Nunga courts and similar Aboriginal Sentencing Courts have also been established in other Australian jurisdictions.¹¹⁶

¹¹⁴ See generally Paul Bennett, *Specialist Courts for Sentencing Aboriginal Offenders: Aboriginal Courts in Australia* (The Federation Press, 1st ed, 2016).

¹¹⁵ Office of Crime Statistics and Research (OCSAR), 'Aboriginal (Nunga) Courts: Information Bulletin 39' (circa 2006) 2–3; 'Nunga' is a term used by many southern SA Aboriginal people to describe themselves.

¹¹⁶ See generally, Bennett, above n 22; see also Australian Institute of Criminology Internet site, 'Indigenous Courts and Practices in Australia' <<https://aic.gov.au/publications/tandi/tandi277>>.

Nunga Courts are less formal than mainstream courts, having legislative authority under ss 6 and 9C of the *Criminal Law (Sentencing) Act*.¹¹⁷ As previously noted, s 6 frees a sentencing court from the rules of evidence, while s 9C(3) provides that:

A sentencing conference may also include (if the court thinks the person may contribute usefully to the sentencing process) one or more of the following:

- (a) a person regarded by the defendant, and accepted within the defendant's Aboriginal community, as an Aboriginal elder;
- (b) a person accepted by the defendant's Aboriginal community as a person qualified to provide cultural advice relevant to sentencing of the defendant;
- (c) a member of the defendant's family;
- (d) a person who has provided support or counselling to the defendant;
- (e) any other person.

Section 9C only applies to Aboriginal offenders who have pleaded guilty and consented to the application of the Aboriginal sentencing procedures in any criminal jurisdiction in South Australia. Specific Nunga Courts are today conducted monthly at Port Adelaide, and Aboriginal Sentencing Courts are held every two months at Murray Bridge, Port Augusta and Port Lincoln.¹¹⁸

Despite the high number of Aboriginal offenders pleading guilty in the APY Courts, unless the defendant or his legal representative makes a specific application for what is generally termed 'a section 9C conference', Aboriginal Sentencing Courts are not specifically held on the APY Lands. An application for a conference would necessitate an adjournment to a future APY Court, resulting in delays. Given the success of Aboriginal Sentencing Courts in southern regions of South Australia and indeed throughout most of Australia,¹¹⁹ it is unfortunate that those provisions are unavailable on the APY Court Circuit on a regular basis as they are at Port Augusta and other courts mentioned above. This matter is discussed further in chapter 6.

¹¹⁷ *Criminal Law (Sentencing) Act 1988* (SA).

¹¹⁸ See CAA Internet site, Aboriginal Sentencing Courts and Conferences <<http://www.courts.sa.gov.au/OurCourts/MagistratesCourt/Pages/Aboriginal-Sentencing-Courts-and-Conferences.aspx>>.

¹¹⁹ See generally Bennett, above n 114 and above n 22.

E *Cross-Cultural Awareness*

This part will examine how culturally aware the APY Courts are from the perspective of Anangu and magistrates. It will also investigate the level of understanding of the court process by Anangu.

1 *Understanding of Anangu Culture by the Judiciary*

The 1991 Royal Commission into Aboriginal Deaths in Custody recommended that judicial officers and court staff be:

encouraged to participate in an appropriate training and development program, designed to explain contemporary Aboriginal society, customs and traditions. Such programs should emphasise the historical and social factors which contribute to the disadvantaged position of many Aboriginal people today and to the nature of relations between Aboriginal and non-Aboriginal communities today ... [and] that such persons should wherever possible participate in discussion with members of the Aboriginal community in an informed way in order to improve cross-cultural understanding.¹²⁰

The Courts Administration Authority has provided Aboriginal cultural awareness training for some years. A two-day course, delivered by AJOs and other Aboriginal people, is a mandatory requirement for all new staff.¹²¹ Shorter, half-day seminars are also delivered by AJOs in regional areas where local lawyers and others involved in the criminal justice system are invited and encouraged to attend.¹²² Court Administration Authority staff have produced a small information booklet for those attending the APY Courts.¹²³

There is no doubt that the Authority take cultural awareness training for judicial officers and court staff seriously, demonstrated by the training and training resources available to judicial officers. In late 2011, for example, 19 judicial officers and staff from Federal

¹²⁰ Commonwealth, 'Royal Commission into Aboriginal Deaths in Custody National Report' (1991) 88, Recommendation 96.

¹²¹ Courts Administration Authority SA, 'Aboriginal Programs - Aboriginal Cultural Awareness Training' (2017) <<http://www.courts.sa.gov.au/Community/Pages/Aboriginal-Programs.aspx#training>>.

¹²² Interview with Jason Ngatokorua, Port Augusta Aboriginal Justice Officer (telephone interview, 4 May 2017).

¹²³ Courts Administration Authority, *Guide for Court Visitors to the Anangu Pitjantjatjara Yankunytjatjara (APY) Lands* (CAA, 2015).

and South Australian courts visited the APY Lands for six days.¹²⁴ The purpose of the visit was ‘to promote cross cultural awareness between Judicial Officers and Anangu, and to improve understanding between cultures about law and justice matters.’¹²⁵

Of the three magistrates surveyed in 2016, one reported that prior to being appointed to the APY Court circuit, they had attended the mandatory cultural awareness program delivered by the Authority and had also attended the judicial officers’ visit to the Lands mentioned above.¹²⁶ This particular magistrate has a long history of involvement with Aboriginal people and courts involving Aboriginal people and Anangu.¹²⁷ Another magistrate, but one who was relatively new to the APY Court, stated that they had gained an insight into ‘Indigenous lifestyles in northern and far-northern SA from their work in the Port Augusta, Whyalla and Coober Pedy Courts.’¹²⁸ While the Courts Administration Authority has invested in dedicated cultural awareness programs, the actual culture of the APY Court as practiced on the Lands has reverted to a more legally formal culture compared to the 1970s – 1990s. In other words, cultural awareness is administered in a more dedicated manner, but court practice has not necessarily become more culturally flexible.

2 *Understanding of Court Process by Anangu*

Cross-cultural awareness implies a need for a bilateral understanding of all cultures involved. In contrast with the efforts by the Courts Administration Authority towards cultural understanding by judicial officers and staff, Figure 5.10 reveals that seven of the 21 interviewees (33 per cent) who did answer believed that the magistrate understood only a little of their Anangu culture, while 14 (67 per cent of those who answered) stated the opposite. While this question is subjective, in that no reasons were sought or given for the negative answers, it nonetheless reveals a perception among Anangu that the Court does not understand culture, which in itself is likely to lead to cross-cultural misunderstanding.

¹²⁴ See Courts Administration Authority, ‘The Ripple Effect’ (2011) <<https://www.youtube.com/watch?v=Ten2mRjiCFI>>.

¹²⁵ Ibid.

¹²⁶ Results of survey of magistrates conducted by me in 2016 (question 11).

¹²⁷ Ibid (questions 1-5).

¹²⁸ Ibid (question 11).

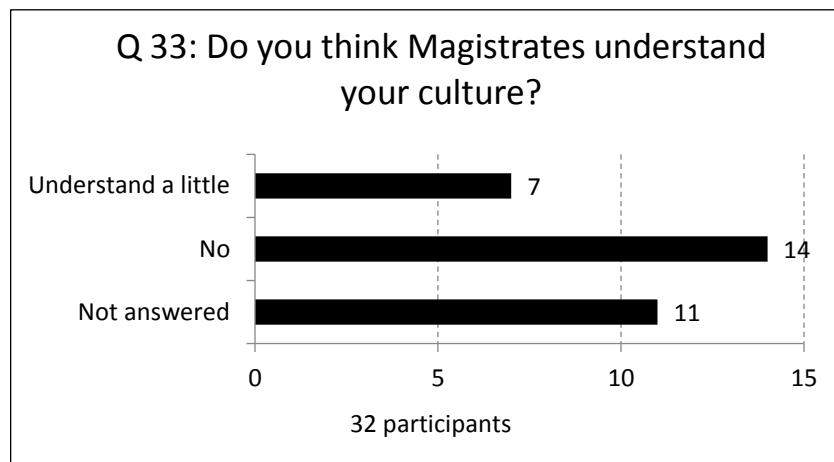


Figure 5.10 — 2016 survey with APY Anangu

The data in Figure 5.10 may well be related to the general lack of understanding about the court proceedings in which Anangu were involved as shown earlier in this chapter in Figure 5.7, where 28 per cent indicated they did not understand court proceedings, and 40 per cent indicated that they only understood a little. This data may indicate the need for improved education about the functions and basic procedures of courts and a case could be made for the court making an effort to demonstrate their commitment to understanding culture. This could be achieved by not only attending the Lands for training, but also visiting communities and having a more visible presence on the Lands. These matters will be examined further in chapter 6.

F *Penalty Options Available to APY Courts*

Depending on the nature of offences committed by Anangu defendants found guilty, there are a range of penalties the APY Courts can apply. These include discharge with or without conviction or penalty, fines, disqualification of drivers' licences, restraining or intervention orders, bonds for good behaviour or with a range of other conditions, supervised or non-supervised community service orders, suspended sentences of imprisonment, or imprisonment.¹²⁹ The 1991 Royal Commission into Aboriginal Deaths in Custody recommended that governments 'should legislate to enforce the principle that imprisonment should be utilised only as a sanction of last resort.'¹³⁰

¹²⁹ See generally *Criminal Law (Sentencing) Act 1988* (SA).

¹³⁰ See Commonwealth, above n 120, vol 3, 64 — recommendation 92; see also *Criminal Law (Sentencing) Act 1988* (SA) s 11.

The relevance of this recommendation is important today given that Indigenous people make up only three per cent of Australia's population, but 30 per cent of Australia's prison population.¹³¹ As reported in chapter 2, 'South Australian ATSI people make up only 1.7% of the state's population',¹³² yet in 2015–16 Aboriginal people made up 26.5 per cent of the total South Australian prison population¹³³ — this figure rose from 16.8 per cent in 2004.¹³⁴ Between 1988 and 2012, South Australia's Indigenous prison population rose by 101.7 per cent.¹³⁵

It has been long-recognised that the imprisonment of traditionally-oriented Aboriginal offenders far from their home in large regional mainstream prisons is problematic.¹³⁶

The 1991 Royal Commission into Aboriginal Deaths in Custody recommended:

That Corrective Services effect the placement and transfer of Aboriginal prisoners according to the principle that, where possible, an Aboriginal prisoner should be placed in an institution as close as possible to the place of residence of his or her family.

Where an Aboriginal prisoner is subject to a transfer to an institution further away from his or her family the prisoner should be given the right to appeal that decision.¹³⁷

In 2004, the Department for Correctional Services (DCS) recognised that 'traditional Aboriginal people have different needs to those living in urban or regional centres with respect to incarceration, rehabilitation, health and spiritual well-being.'¹³⁸ As early as 1999, the DCS commenced planning for a 'low-security correctional facility on, or adjacent to, the APY Lands.'¹³⁹

¹³¹ Australian Bureau of Statistics, *Prisoners in Australia: Aboriginal and Torres Strait Islander Characteristics (December 2016)*

<<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4517.0Main+Features12016?OpenDocument>>.

¹³² Australian Bureau of Statistics, Population Distribution, Aboriginal and Torres Strait Islander Australians, 2006 <<http://www.abs.gov.au/austats/abs@.nsf/mf4705.0>>.

¹³³ Department for Correctional Services, 'Annual Report 2012-13' (Department for Correctional Services, June 2013) 44.

¹³⁴ Department for Correctional Services, 'Annual Report 2003-04' (Department for Correctional Services, October 2004) 23.

¹³⁵ Don Weatherburn, *Arresting Incarceration: Pathways out of Indigenous Imprisonment* (Aboriginal Studies Press, Reprinted ed, 2014) 26.

¹³⁶ Thalia Anthony, *Indigenous People, Crime and Punishment* (Routledge, 2013).

¹³⁷ Commonwealth, above n 120, Recommendation 168. vol 5.

¹³⁸ Powell, above n 8, 6.

¹³⁹ *Ibid* 6.

In 2005, Coroner Wayne Chivell conducted an inquest into the deaths of four petrol sniffers from the APY Lands and recommended that:

The Premier, in consultation with the Minister for Correctional Services, the Aboriginal Lands Task Force and the Central Australian Cross Border Reference Group, should consider as a matter of urgency how the development of a culturally appropriate correctional facility, on or near the Anangu Pitjantjatjara Lands, or as part of a tri-state development at some other reasonably proximate location, might be accelerated.¹⁴⁰

In 2008, the Mullighan Report recommended '[t]hat a corrections facility be established on the Lands for prisoners on remand on a short-term basis.'¹⁴¹ Despite the recommendations and planning already mentioned, in 2008 the State Government indicated that it did not support the Report's recommendation due to the high cost of establishing and operating a correctional facility on or near the APY Lands.¹⁴²

In 2002, South Australian, Western Australian and the Northern Territory Governments formed the Cross Border Reference Group, mentioned by Coroner Chivell, with the aim of 'identifying avenues of possible inter-jurisdictional cooperation within the tri-state region of the NPY Lands'.¹⁴³ The work of the reference group resulted in all three states enacting legislation similar to the *Cross Border Justice Act*.¹⁴⁴ In addition to providing for police, magistrates and other officers of the State to exercise their powers under the laws of the State in another participating jurisdiction,¹⁴⁵ the *Cross Border Justice Act* provides that:

A person who is sentenced to a term of imprisonment or period of detention in respect of an offence under the law of the State is liable to serve the sentence in a prison or

¹⁴⁰ Wayne Chivell, 'Inquest into the deaths of Kunmanara Ward, Kunmanara Ken, Kunmanara Ryan and Kunmanara Cooper - Finding of the State Coroner' (2005) 101.

¹⁴¹ Mullighan, above n 14, 255.

¹⁴² Minister for Aboriginal Affairs and Reconciliation, 'Minister's Response to the Children on Anangu Pitjantjatjara Yankunytjatjara (APY) Lands Commission of Inquiry A Report into Sexual Abuse' (October 2008) 49 (Response to Recommendation 46); see also The Anangu Lands Paper Tracker, *Recommendation 46: Prison facilities for Anangu men* <<http://www.papertracker.com.au/archived/recommendation-46-prison-facilities-for-anangu-men/>>.

¹⁴³ Peter Whellum, 'Missed Opportunities for Culturally Appropriate Imprisonment of APY Offenders: The Cross Border Justice Act 2009 (SA)' (2017) 8(28) *Indigenous Law Bulletin* 20, 20.

¹⁴⁴ *Cross Border Justice Act 2009* (SA) (hereinafter 'the Act'); see also *Cross Border Justice Act 2008* (WA) and *Cross Border Justice Act 2009* (NT).

¹⁴⁵ *Cross Border Justice Act 2009* (SA) s 5(2)(a).

detention centre in the State or another participating jurisdiction if the person has a connection with a cross-border region.¹⁴⁶

Section 20(2)(c) of the Act defines ‘connection with a cross-border region’ as: ‘At the time at which the offence is suspected of having been committed or is alleged or was found to have been committed, the person ordinarily resides or resided in the region.’ Therefore, ‘Anangu who normally reside within the APY Lands and commit an offence for which they are sentenced to imprisonment can serve that sentence in either WA or the NT.’¹⁴⁷

1 *Current APY Courts Imprisonment Options*

As can be seen from the discussion above, the only option available to APY Courts when imposing a sentence of imprisonment for Anangu defendants is to have them sent to the Port Augusta Prison. Despite having the provisions of s 98 of the *Cross Border Justice Act* available to the court, whereby prisoners may be able to serve their time in the closer Alice Springs Correctional Facility, this option is not available due to that facility being at maximum capacity.¹⁴⁸

The Port Augusta Prison has a 12-person unit dedicated to Aboriginal offenders, called ‘Pakani Arangka (a good growing place), located within a large garden, [which] enhances the ability to provide culturally specific programs and allows cultural interaction amongst offenders.’¹⁴⁹ Despite this, the Port Augusta Prison is still a long distance from the APY Lands and can only be seen as culturally inappropriate for traditional Anangu prisoners.

2 *Opportunities for Alternative Imprisonment of Anangu Offenders*

According to Lange Powell, then Director of South Australian DCS, in 2004 under the auspices of the Cross Border Justice Project, talks commenced between all three states on the proposal for a 50-bed community corrections facility to address the needs of all three jurisdictions. The report received approval from all three states’ Chief Executives

¹⁴⁶ Ibid s 98(1).

¹⁴⁷ Whellum, above n 143, 20.

¹⁴⁸ Ibid.

¹⁴⁹ See Department for Correctional Services, Port Augusta Prison <<http://www.corrections.sa.gov.au/prisons/port-augusta-prison>>.

of Justice.¹⁵⁰ As I reported in 2017, the Western Australian Government constructed a Prison Work Camp at Warburton in 2010 at a cost of \$17 million.¹⁵¹ At first glance, it would appear the project mentioned above by Powell had come to fruition but an examination of the situation reveals that the Warburton facility was a reaction by the Western Australian Government to the tragic death of an Aboriginal elder who died of heat stroke in the back of a prison van in 2008 while being transferred from Warburton to the Boulder prison.¹⁵²

Unfortunately, after just over four years, the Work Camp was closed in November 2015 due to the high cost of maintaining prisoners in that facility. At the time of closure, only eight prisoners (of the maximum 30 prisoner capacity) were being housed at Warburton.¹⁵³ At that time, eligibility of prisoners deemed suitable for imprisonment at Warburton had been conducted by the host regional prison at Boulder, 1000 kilometres south, a matter that was heavily criticised by the Western Australian Inspector of Custodial Services.¹⁵⁴

At the time the Work Camp was opened, local Ngaanyatjarra people welcomed the facility as being ‘the ideal prison for local offenders from the region.’¹⁵⁵ Being approximately 230 kilometres west of Pipalyatjara, 450 kilometres west of Amata, about 550 kilometres west of Ernabella and 700 kilometres from Indulkana, the Work Camp complied with Coroner Chivell’s recommendation, particularly so given the close cultural and familial ties that exist for Anangu throughout the NPY Lands.¹⁵⁶ Although the Work Camp may appear to be a long distance from APY communities, it is closer than the alternative of imprisonment at Port Augusta Prison (at best, approximately 800 kilometres from Indulkana, and at worse approximately 1400 kilometres from Pipalyatjara). More importantly though, the Warburton facilities were regarded as

¹⁵⁰ Powell, above n 8, 9–10.

¹⁵¹ Whellum, above n 143, 21.

¹⁵² Kristyn March and Rebecca Brewin, ‘Warburton Work Camp Underutilised while Lands Prisoners are sent away: Elder’ *ABC Goldfields* (online), 3 July 2014 <<http://www.abc.net.au/local/stories/2014/07/02/4037934.htm>>.

¹⁵³ Western Australia Government, ‘Report of an Announced Inspection of Work Camps in Western Australia’ (Office of the Inspector of Custodial Services, 2015) 41; see also Whellum, above n 143, 21–22.

¹⁵⁴ Western Australia Government, above n 153, 7.

¹⁵⁵ Government of Western Australia Corrective Services Department, ‘Warburton Work Camp’ <<http://www.correctiveservices.wa.gov.au/prisons/work-camps/warburton.aspx>>.

¹⁵⁶ Whellum, above n 143, 21.

being part of the NPY Lands and eminently more suitable for semi-traditional prisoners compared with mainstream prisons.

Although one of the major aims of the Cross Border Justice Scheme included the shared use of prison facilities between the three participating states, and that the Alice Springs Correctional Centre is only approximately 500 kilometres north of central APY Lands communities, this was never implemented. Unfortunately, prison facilities at Alice Springs, and throughout South Australia, appear to be at or close to maximum capacity.¹⁵⁷ Instead, the major emphasis of the Act, ‘appears to be in the more visible areas of multi-jurisdictional cooperation by the courts and the police in addressing issues related to offences committed in one region being dealt with in an adjoining region to where offenders have moved and subsequently [been] arrested.’¹⁵⁸

In the 2011–12 Annual Report the South Australian Department for Correctional Services reported that:

Another APY Lands initiative is the Cross Border Justice Project and the cross-border protocols for the transfer and supervision of prisoners and offenders. In accordance with legislation, Community Corrections provided assessment, monitoring and supervision of offenders in the APY region, with particular emphasis on collaboration to ensure community safety and victim protection.¹⁵⁹

It is noted that no details of the nature and supervision of prisoners or the numbers of prisoners involved under these cross-border protocols is available. As reported:

The reasons why the prison facilities at Warburton or Alice Springs have not been seriously considered have been difficult to officially ascertain but off-the-record discussions with frontline staff from various agencies indicate ambivalence and a lack of support by senior officials in accommodating prisoners from other states. More on point though, it would appear the Alice Springs Correctional Centre is at or over capacity. South Australian prisons are in the same position.¹⁶⁰

¹⁵⁷ Ibid 22.

¹⁵⁸ Ibid 21–22.

¹⁵⁹ Department for Correctional Services, ‘Annual Report 2011-2013’ 37.

<http://www.corrections.sa.gov.au/__files/f/2170/Annual%20Report%202011%20-%202012.pdf>.

¹⁶⁰ Whellum, above n 143, 22.

The continued use of the Port Augusta Prison for Anangu sentenced to terms of imprisonment demonstrates a failure of the broad vision of the Cross Border Justice Project and the *Cross Border Justice Act*.¹⁶¹ Although the above discussion has been about the failure of only one option for the appropriate imprisonment of Anangu prisoners, it is nevertheless indicative of the need for a fresh approach to the administration of justice on the Lands. There are a range of options to respond to Anangu crime, including community orders and non-custodial sentences. Alternatives to imprisonment will be further discussed in chapter 6 of this thesis.

PART 2

I LEGAL REPRESENTATION

There are two bodies providing legal aid in South Australia, the State-funded Legal Services Commission of South Australia (LSC) and the Commonwealth-funded Aboriginal Legal Rights Movement (ALRM) Inc. The services of the former are available, under certain conditions, to all residents of the State, whilst those of ALRM are restricted to Aboriginal people.

A *Legal Services Commission (Legal Aid) — Historical Context*

Although the LSC ceased attending Coober Pedy and APY Courts from November 2015 due to funding cuts,¹⁶² their lawyers played an important role in servicing the APY Lands for many years and an understanding of their services is included in this chapter for historical context.¹⁶³

The genesis of the South Australian LSC was contained in the *Poor Persons Legal Assistance Act 1925* (SA),¹⁶⁴ which allowed for persons committed to trial for an indictable offence to apply to a Judge for the appointment of a counsel for their

¹⁶¹ *Cross-border Justice Act 1990* (SA).

¹⁶² Telephone interview with Tim Weiss, Manager of LSC Whyalla who was responsible for delivery of legal aid to the APY Lands (Quorn, June 2017).

¹⁶³ See, eg, Legal Services Commission of South Australia, '36th Annual Report 2013-14' (September 2014) 98–100.

¹⁶⁴ *Poor Persons Legal Assistance Act 1925* (SA)
< http://www5.austlii.edu.au/au/legis/sa/num_act/pplaa1689o1925358/>.

defence.¹⁶⁵ It appears that from 1876 similar legal assistance was available but only for persons being tried for murder under provisions of the *Criminal Law Consolidation Act 1876*¹⁶⁶ — this was repealed by the *Poor Persons Legal Assistance Act*.¹⁶⁷ Additional legal aid to deserving members of the public was also established by the Law Society of South Australia in 1933, a service which continued until amendments to the *Poor Persons Legal Assistance Act* were made in 1936 to reflect similar services.¹⁶⁸

The LSC now operates under the *Legal Services Commission Act*,¹⁶⁹ to provide legal assistance to disadvantaged persons throughout the State. The Commission is a body corporate, independent of the Government, with the Attorney-General being responsible for its functions.¹⁷⁰ Legal assistance is granted under the following circumstances:

- (a) that legal assistance should be granted where the public interest or the interests of justice so require; and
- (b) that, subject to paragraph (a), legal assistance should not be granted where the applicant could afford to pay in full for that legal assistance without undue financial hardship.¹⁷¹

LSC reports show that approvals of grants for legal assistance to state-wide Aboriginal clients steadily increased from a total of 8.6 per cent of total grants in 2006-07, to 12.9 per cent in 2009-10¹⁷² — separate figures for APY Lands clients are not available. During 2013-14 the LSC operated on a total income of nearly \$43.5 million, mainly from Federal and State funding, and employed 219 people.¹⁷³

¹⁶⁵ Ibid s 3; the amount to be paid for legal services was determined by the Judge, see s 6.

¹⁶⁶ *Criminal Law Consolidation Act 1876* (SA) s 373.

¹⁶⁷ *Poor Persons Legal Assistance Act 1925* (SA) s 3(3).

¹⁶⁸ Attorney-General's Department, 'Review of the Provision and Procurement of Legal Aid Services in South Australia's Criminal Courts: First Report - The Current Context' (South Australian Attorney-General's Department, 2014), 21; a full description of the history of legal aid in South Australia is beyond the scope of this thesis but further information can be obtained from Richard Coates, 'A history of legal aid in Australia' (Paper presented at the 4th Annual Colloquium of the Judicial Conference of Australia, November 1999) <jca.asn.au/wp-content/uploads/2013/11/CoatesPaper.pdf>.

¹⁶⁹ *Legal Services Commission Act 1977* (SA).

¹⁷⁰ Ibid s 10.

¹⁷¹ Ibid s 10(2).

¹⁷² Legal Services Commission of South Australia, '32nd Annual Report 2009-10' (September 2010).

¹⁷³ Legal Services Commission of South Australia, '36th Annual Report 2013-14' (September 2014) 19, 52.

LSC solicitors attended circuit courts at Coober Pedy and the APY Lands (as well as servicing Port Augusta and Whyalla Magistrates Courts).¹⁷⁴ The LSC Annual Report of 2013-14 reveals that LSC Duty Solicitors' work in the Far North consisted of 159 clients in 2010-11, 294 in 2011-12, 377 in 2012-13, and 200 clients in 2013-14.¹⁷⁵ While there is no breakdown of Aboriginal and non-Aboriginal clients it is suggested that other than a few non-Aboriginal clients at Coober Pedy, the majority would in fact consist of Aboriginal people.

Figure 5.11 provides an example of LSC's criminal case workload in the APY Lands in 2013-14:

Court location	Aboriginal clients
Amata	16
Ernabella	18
Fregon	14
Indulkana	30
Mimili	22
Pipalyatjara	8
Total	108

Figure 5.11 — LSC criminal case workload in the APY Lands 2013-14.¹⁷⁶

Note that data in Figure 5.11 does not include 78 matters in Coober Pedy and nine matters in Marla, both part of the Northern Areas Magistrates Circuit Courts — although not provided, it is suggested that many matters would involve Aboriginal people as since 2012, trials are no longer held in the Lands Courts. More recent data is not available due to the cessation of LSC activities in the APY Lands in 2015.

¹⁷⁴ Ibid 98–100.

¹⁷⁵ Ibid 101.

¹⁷⁶ Ibid 89 — figures extracted from a table showing all areas of South Australia.

B *Aboriginal Legal Rights Movement (ALRM) Inc — Historical and
Contemporary Contexts*

Out of serious concerns over the lack of legal representation available to Aboriginal people,¹⁷⁷ the South Australian Aboriginal Legal Rights Movement (ALRM) was incorporated in 1973 with its first Commonwealth Department of Aboriginal Affairs funding of \$22 000, and an early council of 20 Aboriginal and non-Aboriginal members. Since incorporation, ALRM has grown from a small organisation employing a solicitor, field officer and secretary to one of over 80 staff, with offices in Adelaide, Murray Bridge, Port Augusta and Ceduna.¹⁷⁸ Three ALRM lawyers and support members from Port Augusta provide legal aid to Coober Pedy and APY Lands Aboriginal residents during the 12 Magistrates Circuit Courts to these areas each year. During 2015-16, ALRM employed 22 full-time lawyers throughout the state.¹⁷⁹

In the financial year ending 2016, ALRM operated on an income of approximately \$5.25 million, down from \$5.5 million the previous financial year due to a cut in Federal funding.¹⁸⁰ Like other Australian Aboriginal and Torres Strait Islander Legal Services, despite this income and given the aims of the organisation and ever-increasing over-representation of Aboriginal people in the criminal justice system, ALRM suffers from a chronic shortage of funding which has affected the delivery of services to the APY Lands. The current lack of an office and staff within, or close to the Lands, and the vast distances required for travel by either Port Augusta or Adelaide staff, means that services to Aboriginal people in the Lands are spread thinly. Funding constraints do not allow for ALRM lawyers to be more proactive in attending the Lands before each APY Court circuit to interview clients to gain full and proper instructions. Instead, their activities are entirely reactive, particularly evident during the busy APY Court circuits.¹⁸¹ With LSC lawyers no longer servicing APY Courts, the bulk of legal

¹⁷⁷ Attorney-General's Department, above n 168, 23 — prior to the incorporation of ALRM, 'it was not common for Aboriginal people to be represented in the courts.'

¹⁷⁸ Aboriginal Legal Rights Movement Inc (ALRM) Internet site <<http://www.alrm.org.au/aboutus.html>>.

¹⁷⁹ ALRM, 'Aboriginal Legal Rights Movement: Annual Report 2015-2016' (Aboriginal Legal Rights Movement, 2016) 10.

¹⁸⁰ Ibid 57; see also Cheryl Axleby, 'Access to Justice for our most Vulnerable Citizens is a Right not a Privilege' (2017) 39(4) *The Bulletin: The Law Society of South Australia* 22, 24–25.

¹⁸¹ Esposito, above n 63, 12; also, personal observations made during attendance at the APY Lands Circuit Court during March 2015; the same applies to Aboriginal persons attending the Coober Pedy Circuit Court.

representation for APY Anangu clients has fallen to ALRM lawyers, creating problems as will be further discussed below.

II LEGAL REPRESENTATION — CURRENT ISSUES

Issues associated with the provision of legal representation for Anangu offenders before the APY Courts were identified from empirical evidence obtained from surveys taken in 2016 with Anangu, magistrates who have served recently in the Lands, and from legal practitioners having experience before the APY Courts. Other issues have been identified from the available literature, data contained in Part 1 of this chapter and from personal visits to the APY Courts during 2015 and 2016.

A *Client Confidentiality and Conflicts of Interest*

A basic understanding of the lawyer-client relationship is important when examining issues related to confidentiality and conflicts of interest. Central to a lawyer-client relationship is the retainer, a contract that exists between the two parties whereby the services expected of the lawyer are described. The retainer also provides other duties owed by the lawyer to the client and includes fiduciary duties of loyalty and trust, and duties of confidentiality.¹⁸² The retainer is a contract and should normally be reduced to writing but not necessarily so. Under contract law, the onus of proof of the existence of a contract rests with the person so alleging.¹⁸³ Where a properly constructed retainer is not present within the lawyer-client relationship, legal professional privilege is denied. Moreover, where there is no retainer, a lawyer has no right to disbursements and costs from the client.¹⁸⁴ Where no written retainer exists, a lawyer would be prudent to ‘document instructions in writing and in some detail.’¹⁸⁵ The fiduciary duties of loyalty and trust owed by a lawyer to a client preclude the lawyer from acting for another client where there is a conflict of interest.¹⁸⁶

When LSC was providing lawyers to the APY Courts, ALRM and LSC lawyers were able to assist each other in matters involving client confidentiality and possible conflicts

¹⁸² GE Dal Pont, *Lawyer’s Professional Responsibility* (Lawbook, 5th ed, 2013) 113–115.

¹⁸³ See eg, *Wong v Kelly* (1999) 154 FLR 200, 206 (Stein JA).

¹⁸⁴ Dal Pont, above n 182, 69 [3.10].

¹⁸⁵ *Ranclaud v Cabban* [1988] ANZ Conv R 134, 138 (Young J).

¹⁸⁶ Dal Pont, above n 182, 115 [4.50].

of interest with current or former clients.¹⁸⁷ Although private lawyers do attend the APY Court,¹⁸⁸ their presence is not guaranteed and there is a danger of conflicts when ALRM lawyers are the major source of legal representation. This is particularly relevant in family violence matters where the one lawyer is not permitted to act for both the victim and the offender. Even where separate ALRM lawyers represent each party, issues of confidence and conflicts of interest can still arise unless an effective information barrier (often called a Chinese Wall) has been established within the ALRM practice.¹⁸⁹ This may prove difficult to achieve in a small legal practice but a failure to do so presents serious ethical problems for all involved.

Where conflicts are present, and no private-practice lawyers are available to handle the matter, an adjournment needs to be sought to enable the matter to be resolved. However, such action has the potential to add further to hearing delays as already noted. Of equal concern is the rushed nature of the court and the limited time lawyers spend with their clients to fully explain the nature of the retainer and to obtain instructions.

B *Time and Staffing Constraints*

There are no permanent nearby or in-country criminal legal services available to Anangu on the Lands. The nearest is that of the three lawyers located at ALRM Port Augusta, at least 800 kilometres to the south. As these lawyers also service the Port Augusta, Whyalla, Port Pirie and Coober Pedy Magistrates Courts, and the occasional Magistrates Courts at Peterborough, Leigh Creek and Roxby Downs, their services are spread thinly across the northern areas of the state. The result is that ALRM (and private) lawyers only attend the APY Lands during the four-day circuits.

Figure 5.12 reveals that of the eight lawyers surveyed in 2016, only one had attended the APY Lands to take instructions from clients between APY Court circuits — and that lawyer no longer attends the Lands on a regular basis.

¹⁸⁷ *Australian Solicitors' Conduct Rules 2011* (SA) rr 10,11.

¹⁸⁸ ALRM, above n 179, 38.

¹⁸⁹ *Australian Solicitors' Conduct Rules 2011* (SA) rr 10,11.

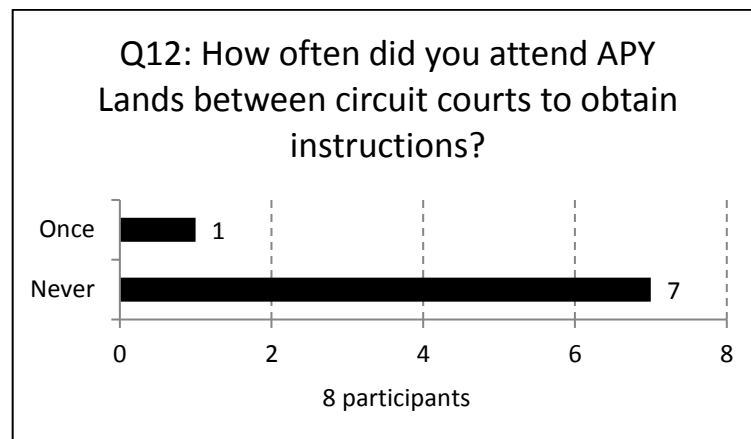


Figure 5.12 — 2016 survey of legal practitioners involved in APY Courts

As shown in Figure 5.13, all lawyers surveyed believed Anangu clients would benefit from visits by lawyers before each court circuit.

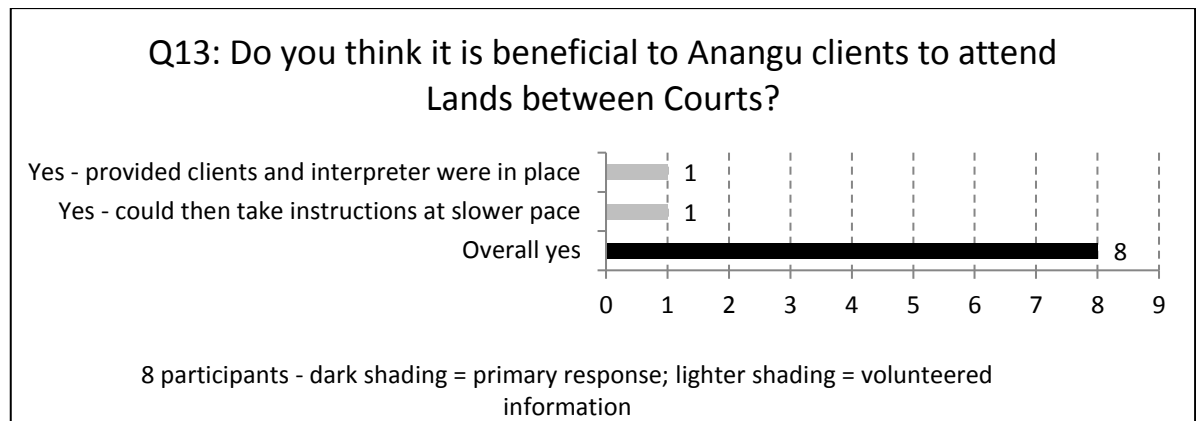


Figure 5.13 — 2016 survey of legal practitioners involved in APY Courts

Due to the rushed nature of the APY Courts as discussed in Part 1 of this chapter, and that lawyers are only available for a few minutes immediately prior to each court session, there are extremely limited opportunities for ALRM solicitors to obtain instructions and to prepare for hearings, and to have meaningful discussions and negotiations with the prosecution.¹⁹⁰ As shown in Figure 5.14, three of the lawyers surveyed stated that magistrates do not spend an appropriate amount of time at each community court during the circuit. Although the five who answered positively were not asked why they thought so, it is possible that lawyers view the magistrate's role as being quite narrow — the court just hears the case and moves on.

¹⁹⁰ See generally Bulman and Sims, above n 27, 24; see also Commonwealth (RCIADIC), above n 120, Recommendation 106.

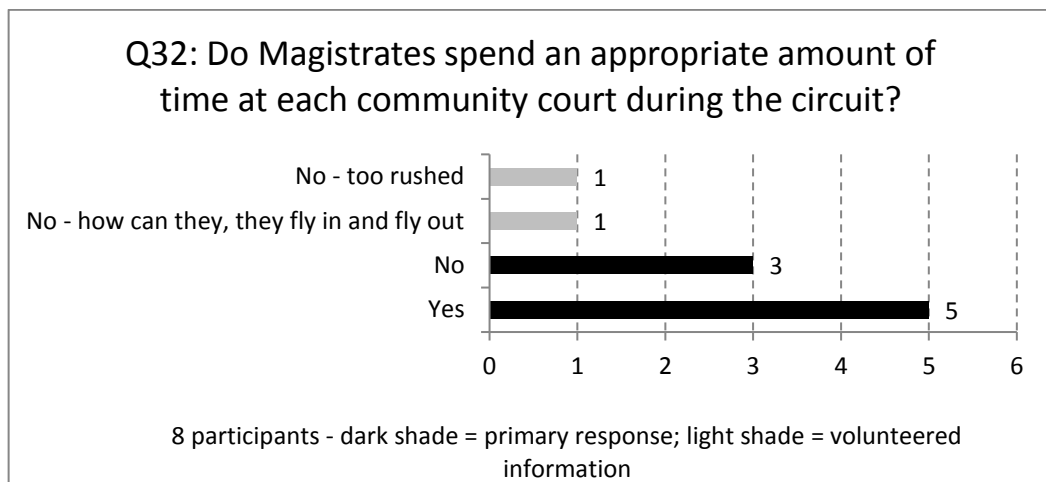


Figure 5.14 — 2016 survey of legal practitioners involved in APY Courts

Figure 5.15 shows that all eight participating lawyers stated that they had insufficient time before each court in which to obtain client instructions:

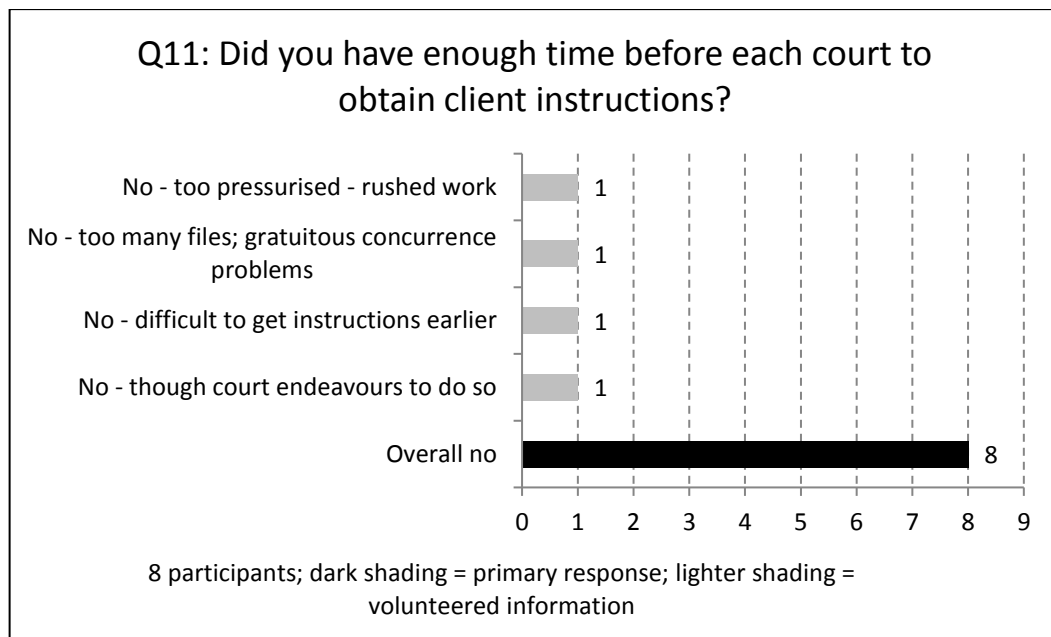


Figure 5.15 — 2016 survey of legal practitioners involved in APY Courts

The data contained in Figure 5.15 is verified in Figure 5.16, which reveals that of the 32 Anangu surveyed in 2016, 23 (72 per cent) stated that they did not have sufficient time with their lawyers to provide instructions. Note that in effect, all Anangu who had attended an APY Court at some time in their lives believed they had insufficient time with their lawyers — see Figure 5.9 in Part 1 of this chapter, where nine participants stated they had not been before an APY Court. The data in Figure 5.15 may reflect a general dissatisfaction with the whole APY Court system, one in its current form that can never be satisfactory.



Figure 5.16 — 2016 survey of APY Anangu

Furthermore, due to the lack of suitable accommodation facilities in most APY communities, lawyers are required to generally stay at the centrally located Umuwa community, requiring often vast distances to be travelled to attend the next court the following morning. This leaves little or no time in which to fully discuss the results of a matter with clients after the court sitting. This is reflected in Figure 5.17, where 19 Anangu participants (60 per cent) stated they had received no feedback on their matters following each court sitting.

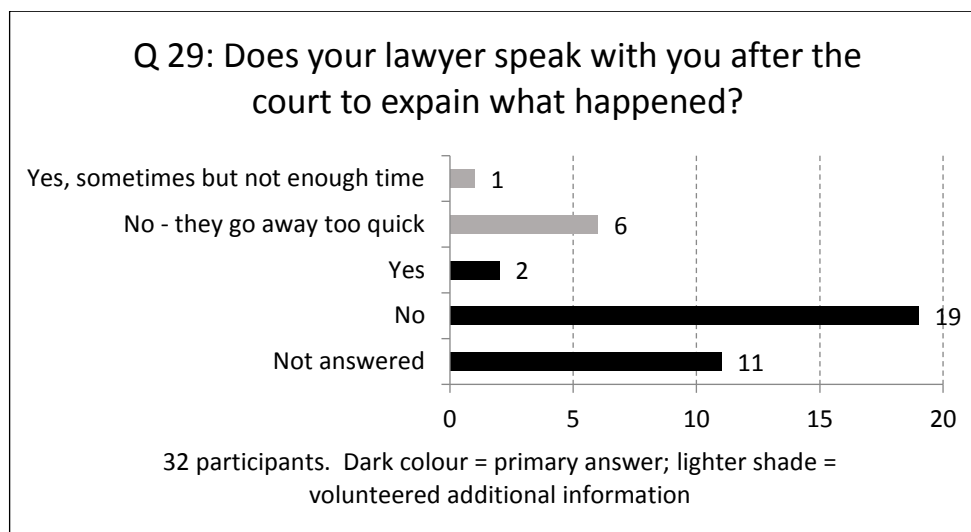


Figure 5.17 — 2016 survey of APY Anangu

The problem though, is partially exacerbated by the fact that quite often those who have appeared on matters will wander away from the court precinct before the court is finished for the day, making it difficult for lawyers to locate them before departing for their distant accommodation in preparation for the next day's court sitting.¹⁹¹

¹⁹¹ As personally observed in 2015 and 2016.

C Lack of Continuity

Problems of having insufficient time to speak with Anangu clients before and after an APY Court sitting are often exacerbated by a lack of lawyer continuity, where it is not uncommon for different solicitors to attend each circuit. This is due to the three lawyers at Port Augusta ALRM taking turns to attend APY Courts with usually a visiting lawyer from Adelaide ALRM. There is also the added problem of lawyers at Port Augusta changing frequently. The result is often a doubling-up of obtaining instructions from clients where a lawyer may be unfamiliar with a matter before the court.¹⁹² These issues result in a lack of constancy of personal contact with clients, which in turn makes it difficult to develop a productive relationship, where there is an accumulation of knowledge and of trust between lawyer and client. There is also a risk of a lack of institutional knowledge as most ALRM lawyers at Port Augusta only stay in the region for a couple of years. The lack of constancy is demonstrated in Figure 5.18 where all 22 Anangu participants who answered stated that they did not always see the same lawyer when matters were adjourned.

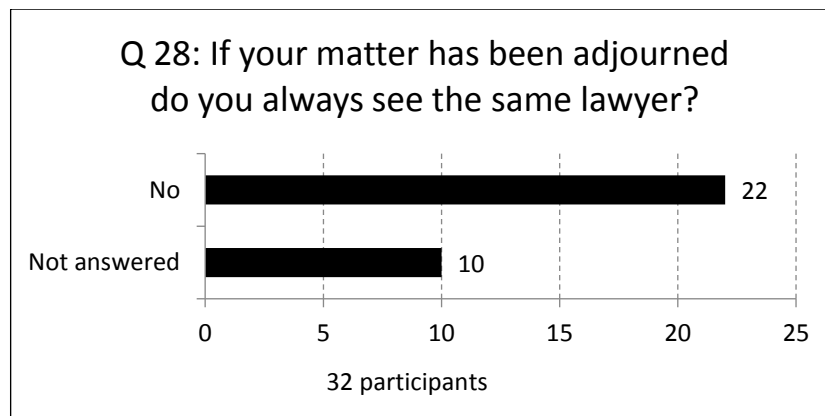


Figure 5.18 — 2016 survey of APY Anangu

Although this problem has been acknowledged by ALRM, lack of resources and funding has prevented any remedial action being taken.¹⁹³

D Cultural Differences

As has been previously discussed, it is imperative that any non-Aboriginal persons working with APY Anangu have a sound understanding of NPY culture to effectively

¹⁹² Ibid.

¹⁹³ ALRM, above n 102, 44.

communicate with the semi-traditional people of the Lands. The Law Society of South Australia have recognised the dangers of cultural misunderstanding where there are ‘significant differences in language and culture, there is a much higher than usual risk of miscommunication ... [which] can have major consequences.’¹⁹⁴

Although an ideal situation may be for Aboriginal lawyers, particularly those with an affinity towards NPY culture to be involved in the criminal law, there is a potential for cultural conflict should such persons represent Anangu clients. A further problem arises where an Aboriginal lawyer from a different region of either South Australia or elsewhere in Australia so acts. Although they share a common Aboriginal identity, their cultural differences may be difficult to overcome. In any case, of the 3956 legal practitioners in SA, only 17 (three male and 14 female) are from an Aboriginal and Torres Strait Islander background.¹⁹⁵ Nationally, there are 66 211 practising lawyers, of which 556, less than one per cent, identify as being Indigenous.¹⁹⁶

Despite the difficulties of Aboriginal lawyers representing Anangu clients, there are nonetheless a variety of professional employment opportunities available within the administration of justice that does not involve the adversarial nature of direct representation before a court. Such opportunities include, for example, positions as legal researchers, registrars of courts, Aboriginal Justice Officers, law clerks, para-legal officers and similar — all of which would benefit from such persons being law graduates.

However, as reported by Rodgers-Falk in 2011, there are problems in attracting Aboriginal and Torres Strait Islander (ATSI) people to the study of law at a tertiary level.¹⁹⁷ The report indicates that in 1970 the number of first-year ATSI students enrolled in an Australian university for a law degree was zero but had risen to 92 in

¹⁹⁴ Law Society of South Australia, ‘Lawyer’s Protocols for Dealing with Aboriginal Clients in South Australia’ (2010) 3.

¹⁹⁵ Information supplied on 8 June 2017 by email from Regulatory Officer (Legal Practice) of the Law Society of South Australia — in my possession.

¹⁹⁶ See Law Council of Australia Internet site, ‘Resources, how many lawyers are there in Australia?’ <<https://www.lawcouncil.asn.au/resources/faqs/how-many-lawyers-are-there-in-australia>>; information also supplied on 8 June 2017 by email from the Law Council of Australia — in my possession.

¹⁹⁷ Phillip Rodgers-Falk, ‘Growing the number of Aboriginal and Torres Strait Islander Law Graduates: Barriers to the Profession’ (2011) <<https://docs.education.gov.au/documents/growing-number-aboriginal-and-torres-strait-islander-law-graduates-barriers-profession>>.

2009.¹⁹⁸ Unfortunately, of the 92 who commenced in 2009, ‘only 45% (41) completed ... it remains clear from the statistics that there are many more ATSI students commencing law studies than are completing them.’¹⁹⁹ Although Rodgers-Falk reported that ‘[p]robably the biggest contributor to the high levels of attrition of ATSI law students within a university environment is cultural disrespect, lateral violence and/or racial discrimination’,²⁰⁰ it is important to recognise other major factors such as pre-tertiary educational standards and being from poorer socioeconomic backgrounds.

Aboriginal lawyers specialising in the criminal law are few and none are involved in the APY Courts. There are no Aboriginal criminal lawyers employed by ALRM, resulting in only non-Aboriginal lawyers representing Anangu in the Lands.

Lawyers have a fundamental ethical duty to act honestly in the best interests of their clients and to deliver legal services competently, diligently and as promptly as reasonably possible.²⁰¹ Where a prudent solicitor lacks the experience or knowledge in a field, the matter should be referred to another solicitor who possesses the necessary knowledge or experience.²⁰² Given the trust clients place on their lawyers, clear and timely advice should be given in order for the client to understand any legal issues involved and to make informed choices about the best way to proceed with a case. Legal advice should be prompt and ‘effected in a form and manner consistent with the client’s knowledge and sophistication’.²⁰³ To represent Anangu clients, a lawyer needs to receive clear instructions and to provide sound legal advice but to do so effectively requires not only a sound knowledge and understanding of NPY culture but also a full appreciation of the ease in which miscommunication can readily arise, particularly through language difficulties. It is only through this knowledge and understanding that mutual understanding and trust between a lawyer and client can be established and maintained. Given the importance of clear communication and understanding in the lawyer-client relationship, the 2016 survey of lawyers representing Anangu asked

¹⁹⁸ Ibid.

¹⁹⁹ Ibid.

²⁰⁰ Ibid.

²⁰¹ *Australian Solicitors’ Conduct Rules 2011* (SA) r 4; see also Dal Pont, above n 182, 93.

²⁰² *Un v Schroter* [2002] NTSC 2, [58] (Martin CJ).

²⁰³ Dal Pont, above n 182, 108; see also *EVB Pty Ltd v Greenwood* (1988) 20 ATR 134, 140 (Brownie J).

questions about the extent of any engagement of cultural training in which they were involved.

1 Cultural Awareness Training

The 2016 survey of eight lawyers reveals that prior to attending the APY Court, five had no prior knowledge of NPY people and culture and three had only knowledge of Indigenous people from other locations within the State — see Figure 5.19.

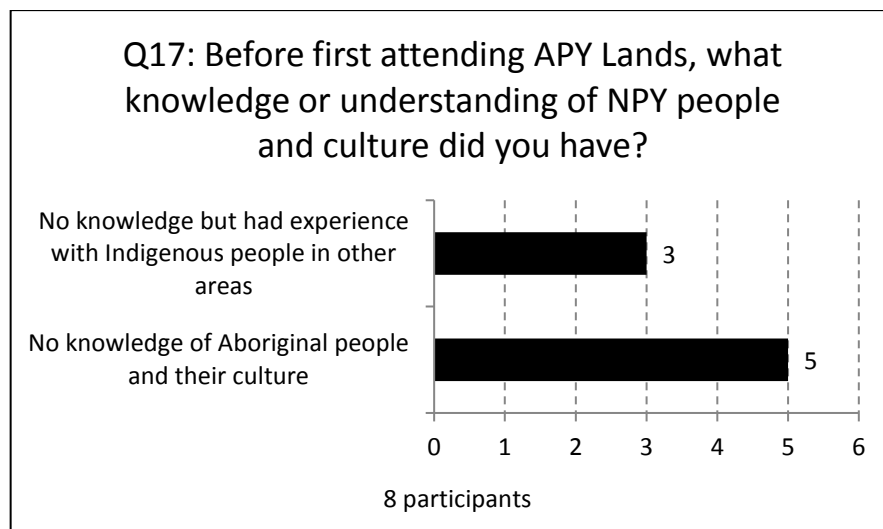


Figure 5.19 — 2016 survey of legal practitioners involved in APY Courts

Figure 5.20 shows that six of the eight lawyers had received official cultural training specific to the NPY culture.

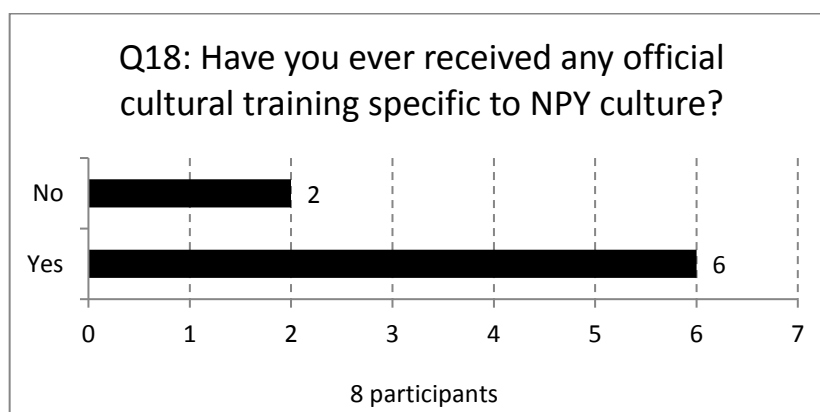


Figure 5.20 — 2016 survey of legal practitioners involved in APY Courts

However, as shown in Figure 5.21, three lawyers stated that the NPY culturally specific training was delivered by Aboriginal people from other regional areas of the state.

While such training provides a general understanding and sensitivity to cultural issues,

it is problematic unless ‘delivered by APY Anangu or, at the very least by highly qualified tertiary academics to reduce not only generalisation but an often encountered “pseudo-traditional lore”, one that is unwittingly promulgated by ill-informed but well-intentioned non-Indigenous people.’²⁰⁴ Other issues include the need for sensitivity of Anangu protocols around death — for example, the use of *Kunmanara* by a person having the same name as a deceased person — and the sacred/secret nature of many *inma*.

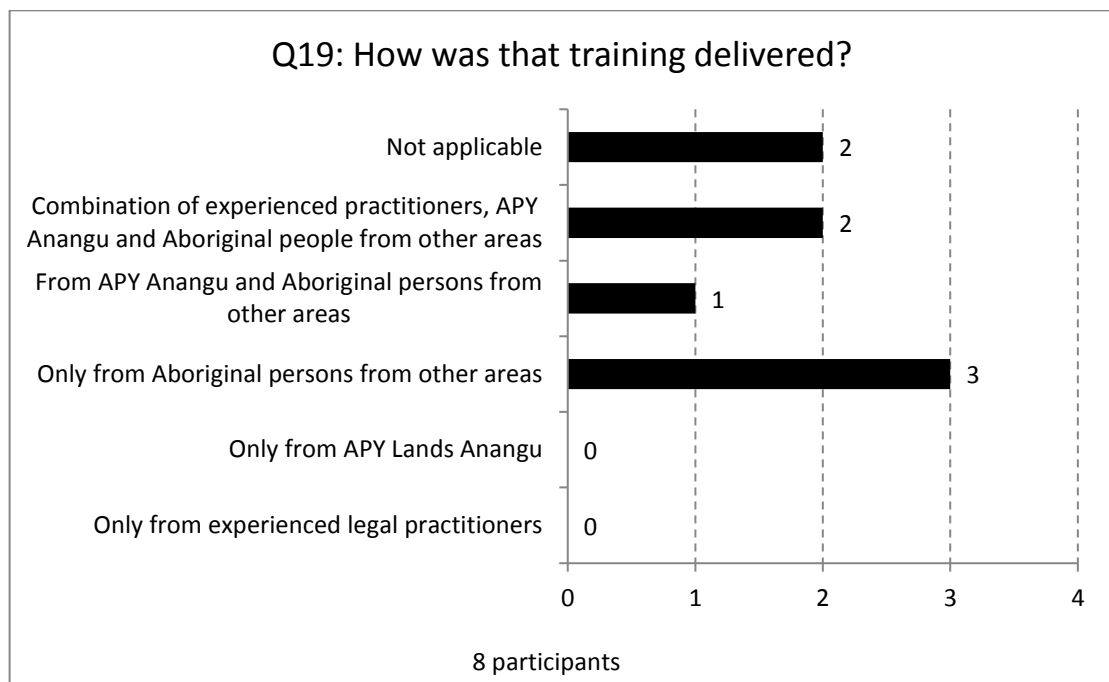


Figure 5.21 — 2016 survey of legal practitioners involved in APY Courts

Cultural awareness is required in both directions. It is important APY Anangu have an understanding and appreciation of the role of lawyers when they appear in court. Given that nine Anangu survey participants (28 per cent) indicated that they did not understand the court proceedings and a further 13 (40 per cent) stated that they understood only a little (see Figure 5.7 in Part 1 of this chapter), it appears that an educational program is required. However, while cultural awareness programs may improve communication and efficacy in translating the criminal justice system for Anangu clients on the APY Lands, it does not alter the basic working of the system itself unless deeper systematic changes are made to that system.

²⁰⁴ Esposito, above n 63, 13.

2 Experience in APY Courts

Of the eight participants, five lawyers had appeared in APY Courts between one and ten times, three had appeared before the court less than five times, which equates to less than 12 months experience, and two had just over 12 months experience (there are six circuits per year) — see Figure 5.22:

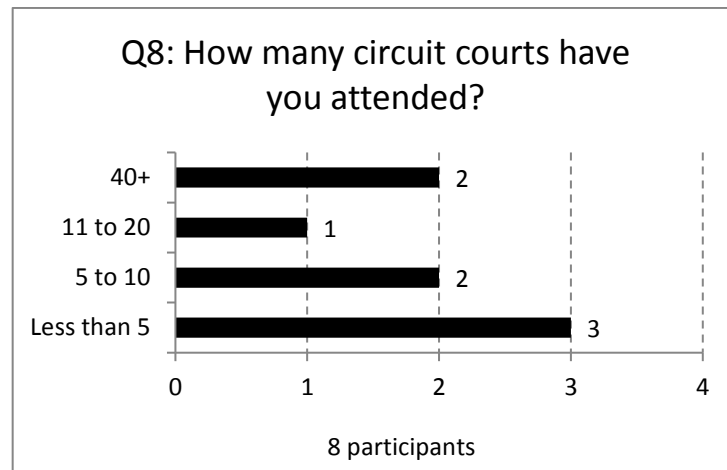


Figure 5.22 — 2016 survey of legal practitioners involved in APY Courts

The data in Figure 5.23 shows that four lawyers had accrued their APY Court experience over a period of two years or less, while the same number accrued their experience between three to 10 years:

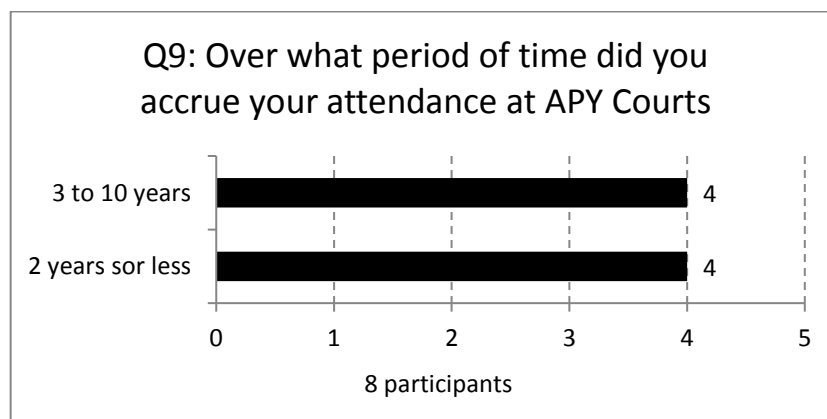


Figure 5.23 — 2016 survey of legal practitioners involved in APY Courts

When Figures 5.19–5.23 are examined, it appears that many lawyers are relatively inexperienced regarding overall APY Court experience and knowledge of NPY culture. When juxtaposed against the data in Figure 5.24, where 22 Anangu (69 per cent) stated that they believed lawyers either do not understand, or had limited understanding of

Anangu culture, even those lawyers with experience were seen to have little or no understanding.

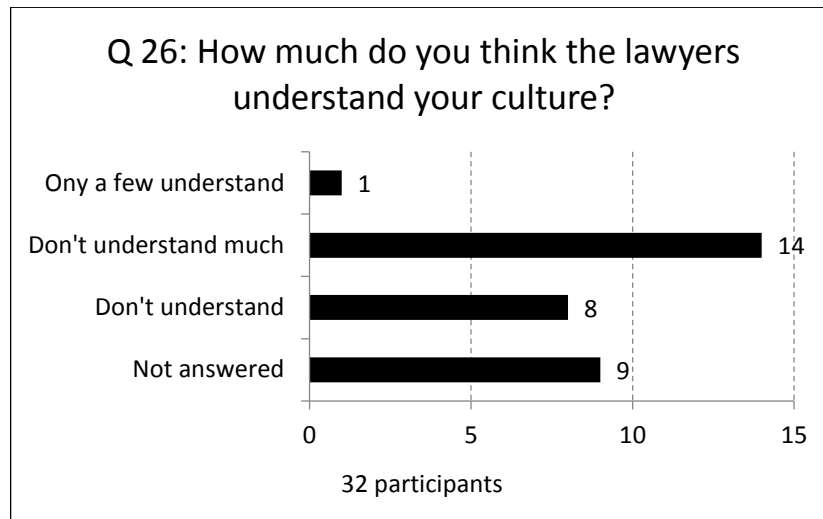


Figure 5.24 — 2016 survey of APY Anangu

The frustration with legal services by Anangu revealed in Figure 5.24 is confirmed in Figure 5.25, where seven of the eight lawyers surveyed stated that language and cultural difficulties were challenging in their legal work in the APY Lands.

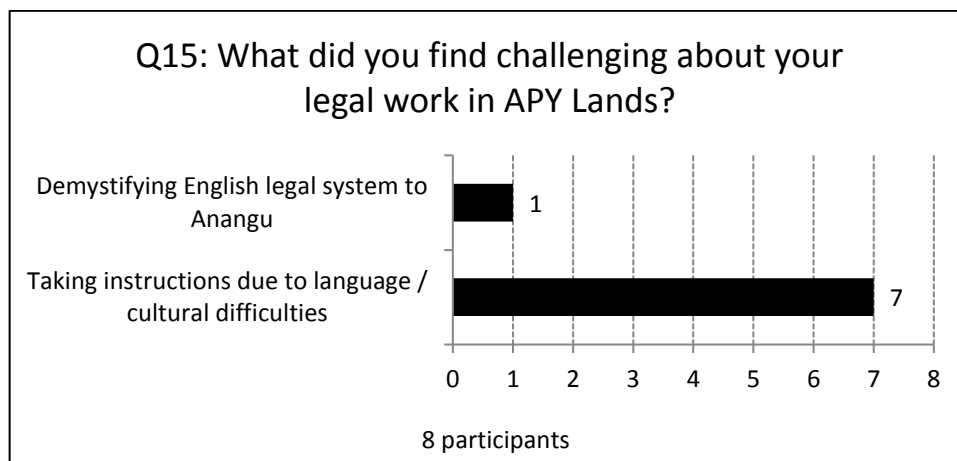


Figure 5.25 — 2016 survey of legal practitioners involved in APY Courts

Although the number of times a lawyer attends the APY Court, as shown in Figure 5.22, is not necessarily a measure of a lawyer's cultural awareness, it does indicate a need for the encouragement of lawyers to return to the Lands more often to earn the trust of communities and Anangu defendants.

3 *Gender Issues*

Although traditional Aboriginal societies are generally egalitarian, men and women in the NPY culture play different roles within their communities and kinship groups. Both have their own ceremonies, many of which are sacred and practised only by members of each gender.²⁰⁵ Generally, sacred Dreaming knowledge relevant only to each gender is not shared between them. To disclose such Dreaming knowledge to those not permitted to receive that knowledge is a serious affront within Anangu society.²⁰⁶

APY men and women are generally happy to share certain information with non-Aboriginal people, but only to members of the same gender. It is for this reason that caution needs to be exercised when female lawyers are representing Anangu men, and vice versa. To this end, the LSC Duty Solicitors Handbook warns of the importance that ‘the duty solicitor is alert as to whether their gender is affecting their ability to assist a defendant, and whether it is appropriate that a duty solicitor of the same gender assists the defendant rather than them.’²⁰⁷ While this is sound advice, a problem exists where there is a failure by lawyers to actually recognise and appreciate the issue, and is one which can be avoided by lawyers receiving adequate cultural awareness training and being encouraged to attend APY Courts more often. There is also a problem if duty solicitors of only one gender are available. The problem is not confined to individual cultural training, but also involves more systemic cultural training required within organisations.

4 *Interpreters*

The importance of using interpreters has been widely discussed previously in this chapter and elsewhere in this thesis and is as relevant to lawyers acting for Anangu clients as it is for the police and courts. The majority of Anangu in the APY Lands speak an NPY dialect as their first language and even those who speak English generally use a form of Aboriginal English, which is heavily influenced by their first

²⁰⁵ W H Edwards, *An Introduction to Aboriginal Societies* (Social Science Press, 2nd ed, 2004) 85–87; see also Maggie Brady, *Dealing with disorder: Strategies of accommodation among the southern Pitjantjatjara, Australia* (Master of Arts Thesis, Australian National University, 1987) 105–120.

²⁰⁶ Edwards, above n 205, 72–76; see also Brady, above n 205, 105–120.

²⁰⁷ See Legal Services, Role of the Duty Solicitor, Gender Issues
<<http://www.lsc.sa.gov.au/dsh/print/ch01.php#Ch1243Se240023>>.

language.²⁰⁸ There is a tendency for inexperienced police, lawyers or court staff to underestimate miscommunication when the person being interviewed speaks English as a second language.²⁰⁹ While it is generally accepted that a short test should be administered in order to gauge whether an interpreter is required,²¹⁰ this thesis contends that as the majority of Anangu speak English as a second language, an interpreter *should* be used by lawyers on every occasion they interview Anangu clients.

Of the eight lawyers surveyed in 2016, only one stated that they were reasonably proficient in NPY languages — see Figure 5.26.

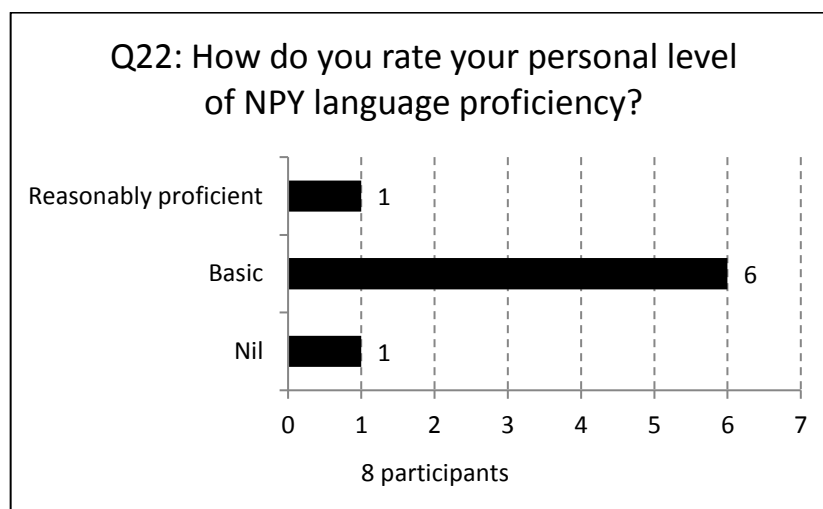


Figure 5.26 — 2016 survey of legal practitioners involved in APY Courts

As revealed in Figure 5.27, three of the surveyed lawyers stated that they always use an interpreter, while four stated they used an interpreter when they were available:

²⁰⁸ See eg, Chapter 3, Figure 3.1 of this thesis.

²⁰⁹ Law Society of South Australia, above n 194 10.

²¹⁰ Ibid 176, 10–12; see also, Kimberley Interpreting Service, ‘Guidelines to determine whether an Indigenous language interpreter is required’ <<http://www.kimberleyinterpreting.org.au>>; see also Northern Territory Aboriginal Interpreter Service, ‘How to decide if you should work with an interpreter — Legal’ <<http://www.nt.gov.au/ais>>.

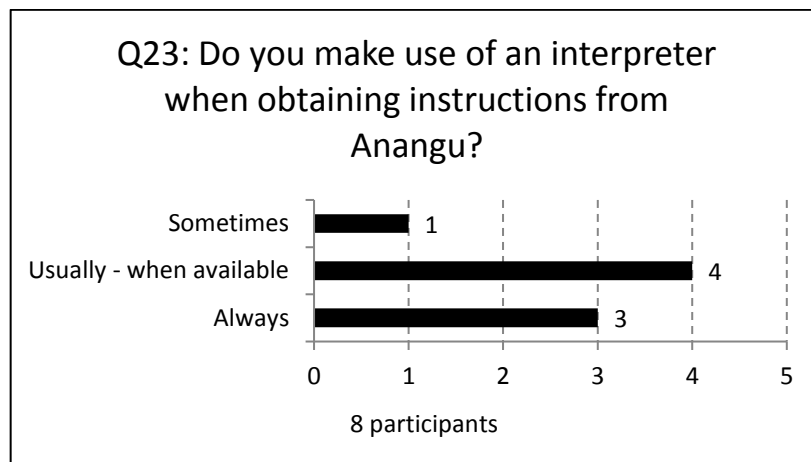


Figure 5.27 — 2016 survey of legal practitioners involved in APY Courts

Options available to lawyers in the absence of interpreters were addressed by Muirhead J in *Putti v Simpson*:²¹¹

If counsel requires an adjournment for a given purpose surely it is his responsibility to make a firm application in unambiguous terms. If the grounds have merit such an application will seldom be refused. If counsel does not understand his client's instructions then he should not proceed until he does.²¹²

Figure 5.28 shows that of the 22 Anangu survey participants who responded, 15 (68 per cent) stated that an interpreter was not used by lawyers. Only one indicated that they understood English sufficiently and did not require an interpreter.



Figure 5.28 — 2016 survey of APY Anangu

²¹¹ *Putti v Simpson* (1975) 6 ALR 47.

²¹² *Ibid* 51 (Muirhead J); the importance of using an interpreter for Anangu was also emphasised in *Frank v Police (SA)* [2007] SASC 288.

It would appear ALRM does not have sufficient funding to employ Pitjantjatjara or Yankunytjatjara interpreters and instead rely on NTAIS interpreters used by the APY Court circuit as discussed in Part 1 of this chapter and revealed in Figure 5.29.

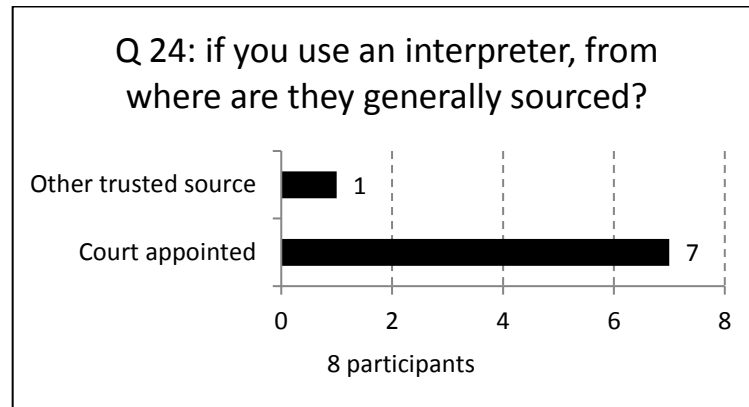


Figure 5.29 — 2016 survey of legal practitioners involved in APY Courts

Personal observations of the conduct of APY Courts reveals that private lawyers also rely on the court-appointed interpreter. Concerns over language problems had been raised by ALRM Ceduna staff as early as 1997: ‘There are always language problems [at the Yalata Court] when one is dealing with people whose first language is not English. If these problems are not addressed then the clients do not understand what is happening to them and end up blaming ALRM for their predicament.’²¹³ Although this comment was made regarding the Yalata Court, it applies equally to the APY Lands Courts as both areas are home to Pitjantjatjara peoples. In 2014, ALRM voiced further concern about the general lack of interpreters for Aboriginal people:

The Court system continues to malfunction in the lack of provision of Interpreters in all Courts. This is a direct consequence of the States’ failure to adequately resource the South Australian Justice System. In addition, neither SAPOL nor the Correctional Services Department employ Aboriginal interpreters.²¹⁴

Further evidence of the need for experienced interpreters is provided in Figure 5.30, which reveals that six of the lawyers surveyed believed Anangu defendants did not understand conditions attached to bail and intervention orders.

²¹³ ALRM, ‘Aboriginal Legal Rights Movement Inc: Annual Report 1996/97’ (Aboriginal Legal Rights Movement Inc, 1997), 53.

²¹⁴ ALRM, above n 102, 29.

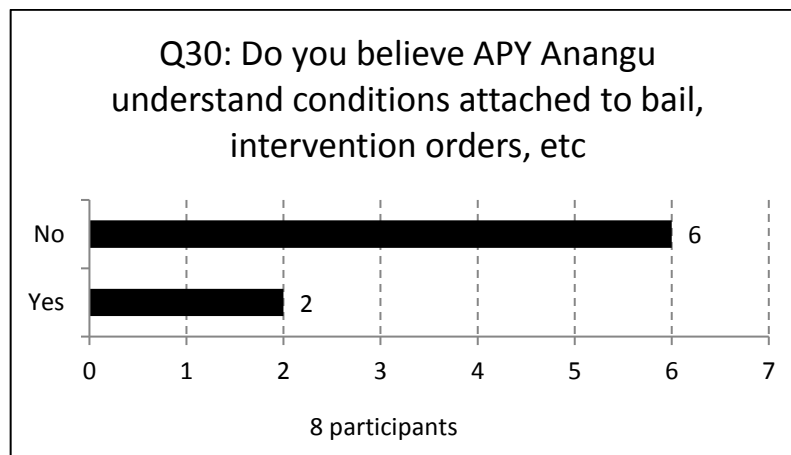


Figure 5.30 — 2016 survey of legal practitioners involved in APY Courts

This lack of understanding means that Anangu may be placed at an unacceptable risk of being arrested for breaching such conditions, further increasing the already excessively high rates of Aboriginal incarceration.²¹⁵

The lack of understanding by Anangu may also be exacerbated by hearing loss. As discussed in chapter 3, hearing loss in Australia's Indigenous population is the highest in the world, 'surpassing the World Health Organization pandemic criteria.'²¹⁶ As reported by the ABC News (online), a 2011 study in the Northern Territory revealed that 94 per cent of Aboriginal prisoners in custody in the Darwin and Alice Springs Correctional Centres suffered from significant hearing loss.²¹⁷ Despite recommending that routine hearing tests be conducted within Northern Territory prisons and that the information be shared with the courts and police, it appears nothing eventuated.²¹⁸

Hearing loss or impairment suffered by non-Aboriginal fluent English-speaking defendants would be easily recognised by lawyers during the initial client interview. However, when interviewing Anangu clients without the assistance of an interpreter, there is a possibility this affliction may be assumed to be due to shyness or a simple reluctance to speak because of gratuitous concurrence. Given the impact of shame (*kunta*), lawyers need to be aware of the likelihood that an Anangu defendant is unlikely

²¹⁵ Esposito, above n 63. 12–13.

²¹⁶ Government of South Australia, 'Submission No 145 to Commonwealth of Australia, Senate Community Affairs References Committee, *Inquiry into hearing health in Australia*' (SA Government, 9 October 2009) 23 [5.1].

²¹⁷ Belinda Lopez, *Is hearing loss the biggest Aboriginal justice issue in the Top End?* ABC News (online) 1 July 2017 <<http://www.abc.net.au/news/2017-07-01/is-hearing-loss-the-biggest-aboriginal-justice-issue-in-top-end/8663102?pfmredir=sm>>.

²¹⁸ Ibid.

to admit to suffering from hearing loss, a matter which may also play a role in a convenience plea.²¹⁹

5 Convenience Pleas

A convenience plea is one where a defendant, despite being innocent, pleads guilty to an offence in order to finalise the matter as soon as possible and is a situation often faced by lawyers representing Aboriginal defendants.²²⁰ Where such intentions are made known to the court, the magistrate will not accept the plea and suggest the defendant seek legal advice.²²¹ There is a danger of a later appeal on the grounds of a miscarriage of justice where a defendant claims they received incorrect legal advice or were misled or pressured by their lawyer — such action can also result in disciplinary action against the lawyer.²²² Where a defendant insists on a convenience plea, it is imperative that the lawyer makes an accurate recording of their instructions and advice received.²²³

A lawyer's 'duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty.'²²⁴ Moreover, a lawyer must be frank and must not 'deceive or knowingly or recklessly mislead the court.'²²⁵ Lawyers acting for defendants desiring a convenience plea are therefore faced with ethical issues, particularly where, as a general principle, 'counsel of course will emphasise that the accused must not plead guilty unless he has committed the offence charged.'²²⁶ However, a lawyer is not prohibited from acting for a client who insists on a convenience plea, a matter discussed in *Meissner v R*,²²⁷ where the court stated:

A person charged with an offence is at liberty to plead guilty or not guilty to the charge, whether or not that person is in truth guilty or not guilty. An inducement to plead guilty

²¹⁹ Law Society of South Australia, above n 194, 7.

²²⁰ See eg, Legal Services Commission of South Australia (online), 'Advising defendants about whether to plead guilty' <<http://www.lsc.sa.gov.au/dsh/ch09s10.php>>; see also Benjamin Bickford, *Convenience Pleas* (Aboriginal Legal Service, NSW and ACT, 2011).

²²¹ Ibid.

²²² *Stengle v Wells* [1985] SASC S4958 (Unreported, Cox J, 30 April 1985); see also *Akpata v Police* [2003] SASC 305.

²²³ *Stengle v Wells* [1985] SASC S4958 (Unreported, Cox J, 30 April 1985).

²²⁴ *Australian Solicitors' Conduct Rules 2011* (SA)177, rule 3.1.

²²⁵ Ibid, rule 19.

²²⁶ *R v Turner* [1970] 2 QB 321, 326 (Lord Parker CJ).

²²⁷ *Meissner v R* (1995) 184 CLR 132.

does not necessarily have a tendency to pervert the course of justice, for the inducement may be offered simply to assist the person charged to make a free choice in that person's own interests. A Court will act on a plea of guilty when it is entered in open Court by a person who is of full age and apparently of sound mind and understanding, provided the plea is entered in exercise of free choice in the interests of the person entering the plea. There is no miscarriage of justice if a Court does act on such a plea, even if the person entering it is not in truth guilty of the offence.²²⁸

Before acting for clients entering a convenience plea a lawyer needs to fully and carefully explain the ramifications of such a plea, including the fact that a guilty plea 'is an admission of the elements of the offence, so that submissions in mitigation can be advanced only on the basis that the client is guilty.'²²⁹ Such advice given, and instructions received, should be supplied in writing, 'otherwise the lawyer may be at the mercy of a client who repents from her or his decision.'²³⁰ Lawyers also need to guard against facilitating guilty pleas for their own convenience.

In 2011, Benjamin Bickford, a lawyer with the NSW Aboriginal Legal Service, reported that there are many reasons why Aboriginal defendants may wish to enter a plea of convenience. Although many of the reasons suggested apply to non-Aboriginal people, they also apply to Anangu offenders:

1. Wishing to have a matter disposed of as quickly and conveniently as possible ... to avoid having to return to Court ...
2. Some clients are too embarrassed to confess the nature of their conduct to their lawyers ... common in domestic violence matters and ... allegations of sexual misconduct ...
3. [I]n matters involving allegations of sexual misconduct, in particular child sex offences, a client will inevitably avoid admitting guilt, despite pleading guilty, to avoid any consequences that may flow upon being convicted of such ... [for Anangu, such consequences may involve severe traditional punishment and/or banishment from their community]
4. [S]imply not able to remember the offence ... due to heavy self-induced intoxication ... at the time of the alleged offence ... inability to remember a matter

²²⁸ Ibid 141 (Brennan, Toohey and McHugh JJ).

²²⁹ Ibid 157 (Dawson J); see also *R v Allison* (2003) 138 A Crim R 378, [24] (Jerrard JA).

²³⁰ *R v Allison* (2003) 138 A Crim R 378, [2] (McMurdo P), [26] (Jerrard JA).

that happened some time ago, or perhaps as a result of a head injury or mental illness affecting the client's memory ... [In the APY Lands, an Anangu offender may be suffering from brain damage and severe mental impairment due to chronic petrol sniffing and may be mentally unfit to stand trial]²³¹²³²

A failure to recognise when an interpreter should be used by lawyers may result in Anangu defendants being frustrated and entering pleas of guilty to have their matters finalised at the earliest time.²³³ As noted in point 4 above, an Anangu offender may be mentally unfit to stand trial because of chronic petrol sniffing, a vitally important matter that may be missed by a lawyer without assistance from an interpreter.

A further contributing factor for a convenience plea is one of shame (*kunta*), which for Anangu, as discussed in chapter 3, 'has no similar equivalent in non-Aboriginal society but is a mixture of embarrassment and fear.'²³⁴ There may also be a well-founded fear in the knowledge that a plea of not guilty will result in a trial at Coober Pedy. These fears are demonstrated in Figure 5.31, where 21 of the 23 Anangu participants who had been to court stated they experienced feelings possibly related to *kunta*. Two respondents reported that they likened the small APY courtrooms to *kulpi tjukutjuku* (being in a small cave), resulting in feeling claustrophobic.

²³¹ *Criminal Law Consolidation Act 1935* (SA) s 269H.

²³² Bickford, above n 220, 4.

²³³ Ibid; see also Nicola Gage, *Indigenous Interpreter Shortage 'adding to high incarceration rates' for Aboriginal people* ABC News (online) 1 March 2017 <<http://www.abc.net.au/news/2017-03-01/lack-of-indigenous-nterpreters-keeping-aboriginal-people-prison/8313176>>.

²³⁴ Edwards, above n 205, 108; see also *R v Kina* (Unreported, Queensland Court of Appeal, 29 November 1993).

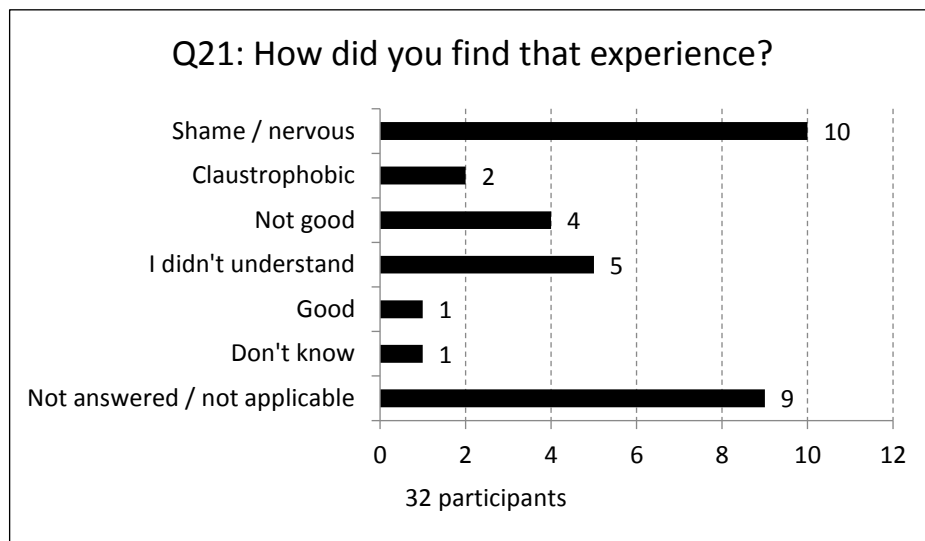


Figure 5.31 — 2016 survey of APY Anangu

Figure 5.32 shows that of the 25 survey participants who had been before an APY Court, 12 (48 per cent) understood that if they wished to plead not guilty, their case would be adjourned to the Coober Pedy Magistrates Court.

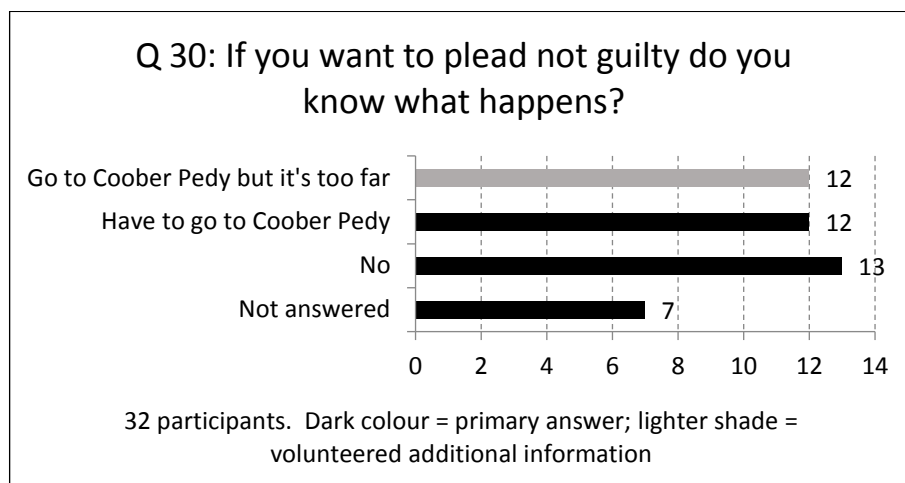


Figure 5.32 — 2016 survey of APY Anangu

It is also suggested that the possibility of attending a trial at the Coober Pedy Court would be an additional factor in Anangu defendants entering convenience pleas. Another factor may be driven by legislation, where s 10B of the *Criminal Law (Sentencing) Act*²³⁵ provides a penalty discount of up to 40 per cent where there is an early plea of guilty. Although these provisions apply to every defendant, they have

²³⁵ *Criminal Law (Sentencing) Act 1988 (SA)*.

particular relevance for Anangu offenders who maybe facing a sentence of imprisonment at Port Augusta, a long distance from their community and family.

6 *Community Involvement in the Court Process*

Part 1 of this chapter describes how senior Anangu elders were, in earlier decades, encouraged to provide the APY Court with sentencing information about the attitude of communities towards an offender's behaviour. The rushed nature of the current court, and often a lack of space within the building where the court convenes in each community, has seen this practise cease and instead the court relies on submissions from representing lawyers. This is problematic when inexperienced lawyers may not be fully aware of the value of community input into the sentencing procedures as permitted under the *Criminal Law (Sentencing) Act*.²³⁶ Without direct community involvement and submissions of this nature, Anangu offenders may be disadvantaged by subsequent sentencing by the court. This matter is discussed further in chapter 6.

7 *Lack of Facilities*

Issues of cultural sensitivity, confidentiality and trust in the lawyer-client relationship are further exacerbated by the total lack of proper facilities for lawyers providing advice and receiving instructions from Anangu clients. Having no separate office-space, lawyers are forced to interview clients in the open air, outside the court building, usually surrounded by numerous other defendants, community members and often local and visiting police officers.²³⁷ The time constraints associated with the court and the lack of proper facilities result in, at best, ad hoc interviews with, and legal advice given, to defendants. The nature of interviewing clients in public may add to feelings of *kunta* by Anangu where they are visible to other members of their community. This is an important issue as the Court becomes something of a focal point on the day of the circuit, with a large number of community members around to witness lawyer-client relationships. These factors may also result in additional pressures on Anangu defendants to enter convenience pleas.

²³⁶ Ibid ss 6, 9C and 10.

²³⁷ See generally Bulman and Sims, above n 27, 24.

This thesis contends that the court ‘habitat’ has evolved to be less culturally flexible than it was in the 1970s – 1990s, despite more resources like AJOs and cultural awareness training programs being in place. In addition to the disposition of individual magistrates, and the unfamiliarity of often-inexperienced lawyers with the APY Lands environment, this thesis argues that the cultural inflexibility could also be because the Court administration under the Courts Administration Authority is more centralised now than it was previously.

III CONCLUSIONS

The previous two chapters reveal major factors affecting policing practices and the administration of justice within the APY Lands, exposing not only an inadequate understanding and appreciation of the specific cultural needs of APY Anangu but, at a more fundamental level, is symptomatic of a dysfunctional system of justice imposed in the Lands. The current system is impersonal, results driven and lacking cultural sensitivity. These matters need to be addressed in themselves, but more fundamentally, point to a deeper question of whether the system itself needs a paradigmatic shift in thinking.

The problems discussed have been ongoing for decades and injustices will continue to occur in the APY Lands unless there is a dramatic rethinking. Aboriginal people in the Lands deserve the right to be treated fairly and justly by those involved in the administration of justice. Chapter 6 will examine recommendations on how such a rethinking might be achieved and also taps into the problems of Aboriginal people’s relationship to the criminal law which is an ongoing inheritance of a colonial system.

CHAPTER 6: RECOMMENDATIONS

I INTRODUCTION

From South Australia's settlement in 1836 until the 1970s, the approach taken by the State Government towards Aboriginal rights was one of protectionism.¹ However, as described by historian Amanda Nettelbeck, the policies of protection 'eventually became a set of statutes and departments that empowered governments to control virtually every aspect of Aboriginal people's lives.'² For example, the *Aborigines Act 1911* (SA) provided for the establishment of the offices of Chief Protector of Aborigines, and an Aborigines Department, to 'exercise a general supervision and care over all matters affecting the welfare of the aborigines, and to protect them against injustice, imposition, and fraud.'³ This legislation also provided for the establishment of reserves for Aboriginal people, the mission system and the distribution of rations. The legislative control of Aboriginal people was absolute.⁴

A number of issues relating to policing practices and the provision of court and legal representational services to the APY Lands were discussed in chapters 4 and 5. A major contention of this thesis is that the administration of justice in the Lands will be more effective if attention is directed towards Indigenous sovereignty. Current APY criminal justice practices fail to offer effective mechanisms to adequately account for language and cultural differences in this remote region of South Australia. The inclusive concepts of Aboriginal sovereignty are acknowledged by those involved in the criminal justice system. Policies for respecting Anangu culture and language have been

¹ See, eg, *Letters Patent establishing the Province of South Australia 19 February 1836 (UK)* <http://www.foundingdocs.gov.au/resources/transcripts/sa2_doc_1836.pdf>; South Australia's Proclamation <<http://adelaide.sa.gov.au/subjects/the-proclamation>>; see also *Aborigines Act 1911* (SA).

² Amanda Nettelbeck, 'A history of protection: patterns of legal change and continuity' (Paper presented at the Australian and New Zealand Law and History Society Annual Conference University of Canterbury, 14-16 December 2017); see also Amanda Nettelbeck et al, *Fragile Settlements: Aboriginal Peoples, Law, and Resistance in South-West Australia and Prairie Canada* (University of British Columbia (UBC) Press, 2016) 103-120.

³ *Aborigines Act 1911* (SA) s 7.

⁴ Ibid s 17(3); see also *Aborigines Act 1934* (SA) s 17 (3): 'Any aboriginal or half-caste who refuses to be so removed, or resists such removal, or who refuses to remain within or attempts to depart from any reserve or institution to which he has been so removed, or within which he is being kept as aforesaid, shall be guilty of an offence against this Act'.

developed and promulgated by South Australian Police (SAPOL) and the Courts Administration Authority.⁵ However, when it comes to real-world implementation, these policies often fall short, giving rise to the issues identified in the previous two chapters. Without reform, there is a danger that agencies involved in the administration of justice on the APY Lands could be accused of paying only superficial recognition to Anangu culture, resulting in their continued reliance on the benevolence of government.

An overarching theme of this research is that the achievement of justice requires a recognition and acknowledgement of the central role that Anangu culture and language plays in Anangu lives. Criminal justice cannot simply be imposed but must account for existing Anangu culture and traditional law. In order to realise the potential of legal pluralism, there needs to be, therefore, an acknowledgement of Anangu sovereignty. This chapter discusses a range of suggested reforms to existing criminal justice practices consistent with the theoretical framework of Indigenous sovereignty and soft legal pluralism outlined in chapter 2. For illustrative purposes, this chapter also briefly examines how similar issues have been dealt with in the common law countries of Canada, New Zealand and the USA. There are similarities in the way colonial law was introduced in these countries and developed over time. Each country also has similar political structures and levels of wealth to Australia. Although there are significant differences in the engagement between colonisers and the Indigenous peoples in each country, much can still be learnt from the approach to policing and criminal justice across jurisdictions.

II CULTURAL AWARENESS

While the focus of the two previous chapters has entailed a detailed examination of non-Aboriginal authorities, and the experience of participants in the criminal justice system, the focus of this chapter is an exploration of what Anangu and their culture can bring to criminal justice within the APY Lands. The extent of the failures mentioned in previous chapters suggests that a paradigm shift in the administration of justice is called for. In particular, the injection or adoption of more Anangu culture and traditional law into

⁵ See generally, SAPOL, 'Community Constable & Police Aboriginal Liaison Officer Scheme: APY & Yalata Lands: Evaluation and Options' (South Australia Police, June 2011) 9 [4.5–6]; see also Courts Administration Authority, *Guide for Court Visitors to the Anangu Pitjantjatjara Yankunytjatjara (APY) Lands* (CAA, 2015).

existing criminal justice practices would embed into the legal system a recognition of Aboriginal cultural sovereignty and the continuing validity of Anangu law.

As described in chapter 3, the roles played by individual offenders and victims, the emphasis of most European law, does not figure as strongly in traditional law where the focus is on the relationships between kin networks to restore social equilibrium.⁶

However, the criminal justice system currently operating within the APY Lands is based on western adversarial notions of justice, imposed since the early colonial settlement of Australia. In such a system there is little regard for, or accommodation of, Anangu culture and law. Its adversarial nature has little relevance within communities where a semi-traditional lifestyle is still practiced. *Tjukurpa* (Anangu Dreaming) influences almost every aspect of Anangu society, from birth, initiation, marriage, death and cultural ceremonies, avoidance relationships, spirituality, social interactions and expectations — importantly, it also encompasses dispute management, including sanctions and punishments.⁷

A *Culturally Appropriate APY Court Spaces*

The current APY Court circuit operates almost within a cultural vacuum. The fly-in, fly-out (FIFO) Court does very little to take account of Anangu cultural needs. The venue for the APY Court is selected by the Courts Administration Authority without serious consultation with Anangu. There is a limited choice of rooms used for visiting courts. During my field trip in 2016, the Authority used rooms which were connected to administrative centres in each community. For example, at Pipalyatjara, a room in the PY Ku centre (community transaction building) was used, and at Ernabella the community TAFE building was utilised. The rooms were small and public seating was limited, or non-existent.⁸ Uniformed non-Aboriginal sheriff's officers attended to overall security, maintained order and assisted people who had business before the Court.⁹ Unfortunately, being uniformed and often standing in or near the narrow

⁶ Peter Sutton, 'Aboriginal customary law: what is it and what is it not?' (Paper presented at the SA Law Society Seminar: Aboriginal Customary Law, Adelaide, 29 July 2006) 2.

⁷ W H Edwards, *An Introduction to Aboriginal Societies* (Social Science Press, 2nd ed, 2004) 16–32; see also Sutton, above n 6, 1–4.

⁸ See Appendix 1, photograph A1.17.

⁹ *Sheriff's Act 1978* (SA) pt 3 — Security and order at courts and other places.

doorways to the courtrooms, they created a barrier, representing a deterrent to community members who may have wished to view the proceedings.

During my 2015 practical legal training attendance at the APY Court circuits in Pipalyatjara, Amata, Fregon and Indulkana, of the four sittings of the Court in those communities I observed that elders were not used in the court process. This is in stark contrast to the role elders played in the court process a few decades ago,¹⁰ and contrary to the recommendations of the 1991 Royal Commission into Aboriginal Deaths in Custody.¹¹ Despite the fact that most of the matters heard on the Lands originated from guilty pleas, restorative justice programs, a hallmark of *Anangu Tjukurpa*, were not observed in 2015, nor during an October 2016 field trip to the Ernabella Court. Furthermore, trials for those wishing to exercise their right to plead not guilty are adjourned to Coober Pedy, hundreds of kilometres south of the Lands. However, restorative justice, in the form of Aboriginal Sentencing Courts (Nunga Courts), is successfully utilised in southern regions of the State, usually involving non-traditional people.¹² As revealed by my research, there is a disconnect between the APY Court infrastructure and *Anangu*. Cross-cultural awareness by all stakeholders, including *Anangu*, is minimal. Magistrates and their staff generally fly in, administer justice as expeditiously as possible, then fly out as soon as proceedings are completed, leaving little time, if any, for non-adversarial community engagement.

The present Court does not even pay lip service to the ideal of *Anangu* self-determination. The circuit is treated as an administrative challenge where priority is given to completing as many files as possible. The court-led process is conducted in English, with as few participants as possible. Its focus on quick resolution loses sight of the important cultural event at play in a criminal justice proceeding, in which a person living in this remote and semi-autonomous region is being brought before the State law. Other than when making infrequent use of Aboriginal Sentencing Court processes, the present Court only accommodates cultural differences as an ‘add on’ rather than

¹⁰ Richard Bradshaw, ‘Community representation in criminal proceedings’ (1986) 11(12) *Legal Services Bulletin* 111, 112.

¹¹ Commonwealth, ‘Royal Commission into Aboriginal Deaths in Custody National Report’ (1991) recommendation 104.

¹² *Criminal Law (Sentencing) Act 1988* (SA) s 9C; Aboriginal Sentencing Courts are commonplace in Murray Bridge, Port Adelaide, Port Augusta and Port Lincoln; see also Paul Bennett, *Specialist Courts for Sentencing Aboriginal Offenders: Aboriginal Courts in Australia* (The Federation Press, 1st ed, 2016).

something that is structurally inherent. From an Anangu perspective, the Court circuit fails to match their cultural needs or expectations, particularly those associated with the inclusive nature of Indigenous sovereignty. There is little community ownership or acceptance of the imposed adversarial nature of the Court.

There is, however, much to be learned from other common law jurisdictions. While there are differences between the colonisation by treaty of New Zealand compared with Australia, there are nevertheless valuable examples of successful restorative justice programs from that jurisdiction that can be applied to the APY Courts.¹³ Restorative justice in New Zealand, for example, is highly developed, especially for Māori youth.¹⁴ As described by Matiu Dickson,¹⁵ young Māori offenders are dealt with under the provisions of the *Children, Young Persons and their Families Act 1989*.¹⁶ Under these provisions, Māori Youth Courts, called Rangatahi Courts, are held on maraes, traditional Māori meeting places belonging to a particular iwi (Māori tribe), hapū (sub-tribe) or whānau (family). Maraes are ‘the last “bastion” where Māori can, as much as possible, freely and comfortably carry out traditional practices of their ancestors.’¹⁷ The use of maraes as a judicial setting has been generally successful, providing an example of how a culturally appropriate court space can be achieved. Although Anangu have no equivalent of the Māori marae, the entire APY Lands are a stronghold of Anangu culture. This thesis argues that almost any Anangu owned site within the Lands would be viewed as a place where, like Māori, Anangu can feel free to practice their culture. While the restorative justice ideals of the Rangatahi Courts apply only to young offenders, they are an example of what could be realised for *all* APY offenders charged with minor offences.

The administrative buildings currently used for the APY Court space have no cultural relevance for Anangu. Instead, they are seen as centres from which justice is dispensed with little consultation. By providing a more culturally appropriate court space, Anangu

¹³ For a description of early Māori encounters with New Zealand colonial courts, see Shaunnagh Dorsett, *Juridical Encounters* (Auckland University Press, 2017).

¹⁴ See, eg, Kathryn J Fox, ‘Trying to Restore Justice: Bureaucracies, Risk Management, and Disciplinary Boundaries in New Zealand Criminal Justice’ (2015) 59(5) *International Journal of Offender Therapy and Comparative Criminology* 519.

¹⁵ Matiu Dickson, ‘The Rangatahi Court,’ (2011) 19(2) *Waikato Law Review*: 86.

¹⁶ *Children, Young Persons and their Families Act 1989* (NZ).

¹⁷ Dickson, above n 15, 87.

communities would be afforded a measure for addressing the perception of an imposed justice system instead of one being accepted by the community. Such a space would enable offenders and their families to feel more welcome and the community would have more control over how the court space is set up.

B *Recommendations for Improved Court Spaces on the APY Lands*

The following are suggested reforms to address these issues and are consistent with the theoretical framework of Indigenous sovereignty and pluralism outlined in chapter 2. The rushed nature of the courts, the lack of facilities resulting in hearing delays and adjournments of trials to Coober Pedy are, this thesis argues, symptoms of a failure to understand the needs of APY communities. The APY Court is results driven and fails to deliver a satisfactory level of justice to the Lands, a matter requiring urgent attention by the Courts Administration Authority and the State Government.

1 *Incorporation of Cultural Practices within APY Courts*

The incorporation of Anangu cultural practices of restorative justice within court proceedings is essential and closely linked to Indigenous self-determination. Of equal importance is the involvement of APY community representatives in court proceedings to provide judicial officers with important information about the effects of local offending.¹⁸ The present Court only applies the restorative model of Aboriginal Sentencing Courts (Nunga Courts) at the infrequent request of defence lawyers.¹⁹

In Canada, Aboriginal Courts operate on peacemaking or restorative principles, designed to restore social equilibrium within Indigenous communities and, as reported by Karen Whonnock, ‘are important expressions of indigenous sovereignty and self-government’.²⁰ According to former South Australian magistrate Paul Bennett, community-based circle sentencing courts originated in Canadian Aboriginal

¹⁸ Consultation with Aboriginal community representatives is one of the recommendations of the Royal Commission into Aboriginal Deaths in Custody, see Commonwealth, above n 11, recommendation 104.

¹⁹ *Criminal Law (Sentencing) Act 1988* (SA) s 9C.

²⁰ Karen L Whonnock, ‘A tale of two courts: the New Westminster First Nations Court and the Colville Tribal Court’ (2011) 44(1) *University of British Columbia Law Review* 99; see also Peter Sutton, ‘Aboriginal customary law: what is it and what is it not?’ (Paper presented at the SA Law Society Seminar Aboriginal Customary Law, Adelaide, South Australia, 29 July 2006) 2.

communities in the 1990s,²¹ having their origins in *R v Moses*.²² Bennett reports that the New South Wales Circle Sentencing Courts, which commenced in 2002, owe much to the Canadian circle courts.²³ Like the South Australian Aboriginal Sentencing Court, the Canadian Aboriginal Courts are only available to Aboriginal offenders who plead guilty. These sentencing courts are structured as non-adversarial meeting places which include the magistrate, community elders, the offender, the victim, police and other persons having a community interest in the matter.²⁴ Compared with South Australian Aboriginal Sentencing Courts, and particularly the APY Courts, the Canadian Aboriginal Courts afford legal recognition of Canadian Indigenous pluralism and sovereignty, enhancing inclusiveness, described by Whonnock as being ‘important expressions of indigenous sovereignty and self-government.’²⁵ Of course it needs to be noted that the capacity in Canada to build expressions of indigenous sovereignty into its legal structures springs out of a different historical relationship to the Crown from Australia, one that is grounded in treaty.²⁶ From a contemporary perspective, Canadian Aboriginal and treaty rights are formally embedded in the legal life of Canada through s 35 of the *Canadian Constitution*.²⁷ Importantly however, the Canadian Aboriginal Courts can consider alternatives to imprisonment for offenders, providing substantial relief from Indigenous over-incarceration.²⁸

As outlined in chapter 5, the current APY Court has several sentencing options available, including discharge with or without conviction or penalty, fines, disqualification of drivers’ licence, restraining or intervention orders, good behaviour bonds with a range of conditions, suspended sentences of imprisonment, or for imprisonment.²⁹ Where domestic violence has occurred, APY offenders can also be given ‘community based sentencing options such as home/community detention,

²¹ Paul Bennett, *Specialist Courts for Sentencing Aboriginal Offenders in Australia* (Master of Laws Thesis, Flinders University, 2013), Glossary, xv.

²² *R v Moses* (1992) 71 CCC (3d) 347; see also Hugh J Benevides, ‘*R v Moses* and Sentencing Circles: A Case Comment’ (1994) 3 *Dalhousie Journal of Legal Studies* 241, 242.

²³ Bennett, above n 21, 45.

²⁴ *Ibid* 20.

²⁵ Whonnock, above n 20, 108–9.

²⁶ See generally, Amanda Nettelbeck and Russell Smandych, ‘Policing Indigenous Peoples on Two Colonial Frontiers: Australia’s Mounted Police and Canada’s North-West Mounted Police’ (2010) 43(2) *The Australian and New Zealand Journal of Criminology* 356.

²⁷ *Constitution Act 1982* (UK) c 11, sch B (‘*Constitution Act 1982*’).

²⁸ Whonnock, above n 20, 101.

²⁹ See generally *Criminal Law (Sentencing) Act 1988* (SA).

community work, bail supervision, community based rehabilitation and other forms of intensive supervision.³⁰ Under the auspices of the Cross Borders Indigenous Family Violence Program, the South Australian Department for Correctional Services (DCS), with assistance from Northern Territory and Western Australian corrections, is involved in the delivery of family violence awareness training for Aboriginal men ‘largely convicted of offences involving family violence in small and very remote communities.’³¹ This highly successful program has been in operation since 2007.³² Programs like this provide an alternative to imprisonment for Anangu offenders and may prove to be a way forward for culturally appropriate, but non-violent, alternative sentencing options. Although beyond the scope of this thesis, other culturally appropriate sentencing opportunities would need to be carefully researched with close consultation with senior Anangu in the Lands.

Fines as a sentencing option are a contentious issue on the Lands. As described by an Anangu interviewee in 2016, the high unemployment rates and lack of work opportunities on the Lands result in unpaid fines accumulating to the point where drivers’ licences are suspended by the licensing authorities.³³ Such action leaves affected persons limited choices in the remote APY Lands, particularly when travel within that vast region is culturally important.³⁴ Persons driving under these circumstances leave themselves open to further fines and/or ongoing licence disqualification, paving the way for their entry into a cycle of recidivism. Culturally appropriate solutions require further detailed research and discussions with senior Anangu.

2 *Establish Specialised Community Courts*

A paradigmatic shift in thinking is needed when dealing with court processes in the Lands. Specialised Aboriginal Courts in Canada, for example, provide an alternative to

³⁰ Judy Putt et al, ‘Evaluation of the Cross-border Justice Scheme: Final report’ (University of Tasmania, 2013) 41.

³¹ Ibid 35-36.

³² Peter Whellum, ‘Missed Opportunities for Culturally Appropriate Imprisonment of APY Offenders: The Cross Border Justice Act 2009 (SA)’ (2017) 8(28) *Indigenous Law Bulletin* 20, 22.

³³ *Criminal Law (Sentencing) Act 1988* (SA) pt 9, div 3, sub-div 4.

³⁴ For example, attending important *inma* (traditional ceremonies), attending funerals or to attend to important traditional familial obligations.

regular provincial courts for self-identified First Nations, Métis or Inuit people.³⁵ Four Aboriginal Courts, all having ‘peacemaking or restorative aspects’ operate throughout Canada.³⁶ They include New Westminster in British Columbia, ‘the Gladue (Aboriginal Persons) Courts in Ontario, the Cree-Speaking Courts and Dene Speaking Courts in northern Saskatchewan, and the Tsuu Tina Peacemaking Court in southern Alberta.’³⁷ They were established following numerous reports and inquiries into Aboriginal offending,³⁸ and by case law, notably that of the Canadian Supreme Court in *R v Gladue*.³⁹ *Gladue* is an influential case where the Court held that all Canadian criminal courts must take into consideration an Aboriginal offender’s background when being sentenced. Factors include discrimination, separation from family or culture, physical abuse, drug or alcohol abuse, similar to the sentencing principles contained within the Australian High Court case of *R v Fernando*.⁴⁰ Following the Supreme Court’s decision in *Gladue*, a process of creating reports was legislated with information on the offender and sentence options from the perspective of Aboriginal communities. This was introduced in order to assist courts in sentencing.⁴¹ Whonnock reports that there are other reasons for establishing Aboriginal Courts. They include the alleviation of Aboriginal over-incarceration based on ‘indigenous legal theory, law, and traditions ... important expressions of indigenous sovereignty and self-government.’⁴² As mentioned earlier, there is also a constitutional basis for Aboriginal courts and, as described by Whonnock, there are ‘Canadian federal guidelines that allow for Aboriginal communities to administer and enforce their own laws and ... to create their own Aboriginal courts or tribunals.’⁴³ The Canadian Aboriginal Courts operate on a peacemaking or restorative principles.⁴⁴

³⁵ See Department of Justice Government of Canada, *Canada’s Court System: Alternative Approaches* <<http://www.justice.gc.ca/eng/csj-sjc/ccs-ajc/04.html>>; see also Whonnock, above n 20.

³⁶ Whonnock, above n 20, 99.

³⁷ Ibid.

³⁸ Ibid 108, referencing the Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Supply and Services Canada, 1996); *Report of the Aboriginal Justice Inquiry of Manitoba*, vol 1 (Winnipeg: Queen's Printer, 1991) at ch 7.

³⁹ *R v Gladue* [1999] 1 SCR 688.

⁴⁰ *R v Fernando* (1992) 76 A Crim R 58; see also *Bugmy v The Queen* [2013] HCA 37.

⁴¹ See Thalia Anthony et al, ‘Individualised Justice through Indigenous Community Reports in Sentencing’ (2017) 26(3) *Journal of Judicial Administration* 121.

⁴² Whonnock, above n 20, 108–9.

⁴³ Ibid.

⁴⁴ Ibid.

The Canadian model could be used as a strategy for the establishment of a specialised APY Community Court, based on restorative justice principles embracing Anangu culture. Such a strategy could include suitably experienced senior community members performing minor judicial functions. Whonnock, now a Canadian Judge of the Provincial Court of British Columbia, offers an insight into the operation of restorative justice for North American First Nations People in Canada and the Colville Aboriginal Court in Washington State, USA, where ‘there is a low recidivism rate or re-offending rate ... [which] really speaks volumes about the restorative or healing aspect of the New Westminster [Canada] court.’⁴⁵ Legal reform in Canada by the protection of First Nation treaty rights in the *Canadian Constitution* offers a way forward for Australia. Although the subject of an Aboriginal treaty in Australia is currently contentious it is nevertheless relevant.

Such a strategy for the Lands might include legislative change to allow non-serious offending to be punished by culturally appropriate (but non-violent) means other than imprisonment and/or monetary fines. Whonnock, who was a Colville Tribal Court Judge for four years in Washington State, describes how that court ‘lends itself to healing and restorative justice aspects ... [in which] creative sentencing options can include purchasing a teddy bear for a children’s program. It can include performing volunteer service for elders such as chopping firewood.’⁴⁶ Although such a change would necessitate legislative amendments, including the *Magistrates Court Act*,⁴⁷ the *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act*⁴⁸ (APY Land Rights Act) already provides a legislative framework which could be expanded.

APY Land Rights Act by-laws already deal with alcohol related offences which are only relevant within the APY Lands and not elsewhere in South Australia. The focus of such offences is already on protecting Anangu communities. Further community protection could be afforded by extending the by-laws to include common traffic offences and behavioural offences such as disorderly/offensive behaviour, minor property damage and similar non-serious offences. Where there is an admission of guilt, such offending

⁴⁵ Ibid 101.

⁴⁶ Ibid 103.

⁴⁷ *Magistrates Court Act 1991* (SA).

⁴⁸ *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA).

by Anangu, who are defined under the APY Land Rights Act,⁴⁹ could be dealt with by an APY Community Court presided over by Anangu *tjilpis* and *pampas* (senior men and women), appointed as Special Justices of the Peace.⁵⁰ Special Justices of the Peace are appointed by the Governor on the recommendation of the Attorney-General.⁵¹ Non-Anangu offenders committing offences within the Lands would, however, be subject to normal state laws and charged in a State court, as is the situation in Washington.⁵² Similar to the Washington Colville Tribal Court model, an APY Community Court would need to be a court of record, enabling judicial review through normal State appellate courts.⁵³

Such courts could be established for each of the major APY communities of Pipalyatjara, Amata, Ernabella (Pukatja), Fregon (Kaltjiti), Mimili and Indulkana (Iwantja). They could operate monthly, offering a more immediate response to minor offending and reduce the workload of the present APY Court. It also has the potential to reduce the need for court interpreters. The implementation of APY Community Courts would require close consultation between Anangu and the Courts Administration Authority.

A culturally appropriate court space, along with firmly established restorative justice programs, are important matters which would allow Anangu to actively pursue notions of Indigenous self-determination. A community led court operating alongside a State-run court emphasises Anangu control and responsibility, central to self-determination. Such a court could also be conducted in the open air, providing a more culturally appropriate court space. The establishment of specialised APY Community Courts would also provide recognition of soft legal pluralism, offering a degree of independence instead of total reliance on the largesse of government. As already

⁴⁹ Ibid s 4(1) — Anangu are defined as being (a) a member of the Pitjantjatjara, Yankunytjatjara or Ngaanyatjarra people; and (b) a traditional owner of the lands, or a part of them.

⁵⁰ See, eg, *Magistrates Court Act 1991* (SA) s 7A — Special Justices of the Peace may adjudicate in uncontested minor criminal matters, including expiation notice offences and similar, but may not impose a sentence of imprisonment; this idea is not new, see Courts Administration Authority, ‘Report to the Chief Justice of South Australia John Doyle concerning the Law and Justice Conference held at Umuwa on the Pitjantjatjara Lands 25 to 28 May 1998’ (1998), Recommendation 1, 36.

⁵¹ *Justices of the Peace Act 2005* (SA) s 7.

⁵² Whonnock, above n 20, 102; see also Savvas Lithopoulos, ‘International Comparison of Indigenous Policing Models’ (2007) 14,1 <<https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/cmprsn-ndgns-plcng/cmprsn-ndgns-plcng-eng.pdf>>.

⁵³ Whonnock, above n 20, 102.

discussed, such programs have been successful in other common law jurisdictions, demonstrating the possibility of success of similar models in the APY Lands.

3 *Establish a Court at Umuwa*

While the establishment of a specialised APY Community Court represents an ideal situation for Anangu, it requires a rethinking of the administration of justice on the Lands. Until such a court can be established, the present APY Court circuit is likely to continue. There are, however, changes that could be made to cater more for Anangu needs on the Lands. For example, a central court facility could be established at Umuwa and would have many advantages. Although Umuwa is the administrative centre of the Lands, it is nonetheless within Anangu traditional country. The cost of establishing such a facility would be substantially offset by savings from the high costs associated with present FIFO court operations. Such court facilities could include a basic courtroom with a public gallery of sufficient size to permit defendants' families to attend in a support role, and for other community members to attend and view proceedings, enhancing a better understanding of the court process. Suitable internal and sheltered external public waiting areas close to the courtroom should also be included. Such facilities would enhance inclusiveness, an important aspect of Anangu self-determination. Moreover, a dedicated central court would also, weather permitting, allow magistrates to consider conducting outdoor hearings. The present court facilities at Coober Pedy provides an example of a court space that may be suitable for Umuwa.⁵⁴ It is imperative, however, that Anangu are fully involved in the planning, establishment and operation of such facilities, enabling a sense of community ownership.

However, it needs to be noted that establishing a court at Umuwa is not a new idea. In November 2013, the State Government reported that previously allocated 'funds by the Australian Government ... [for a court centre at Umuwa] are being redirected to establish three Family Wellbeing Centres on the APY Lands.'⁵⁵

The advantages of a centrally based APY Court from an Anangu perspective include:

⁵⁴ See Appendix 1 of this thesis, Figures A1-20–21.

⁵⁵ South Australian Government, 'Fifth Annual Report by the Minister for Education and Child Development to the Children on Anangu Pitjantjatjara Yankunytjatjara (APY) Lands Commission of Inquiry: A report into sexual abuse' (November 2013) 75.

- Providing a neutral court space, away from home communities, for matters involving domestic violence and other serious offences.
- Encouragement and facilitation of Anangu participation in, and understanding of, the court process — enhancing inclusiveness and Anangu self-determination.
- Facilitation and encouragement of the Aboriginal Sentencing Court restorative justice programs as a norm rather than an exception.⁵⁶ The non-adversarial nature of restorative justice programs would also help to alleviate *kunta* (shame) as reported in chapter 5.⁵⁷
- Facilitation of hearings conducted in the open air, being more culturally appropriate than those held indoors, and be more visible to the community. Lawyers would be more visible to their clients, which may alleviate the problems of lawyers being unable to readily brief clients about the results of their matters as revealed in chapter 5.
- Enabling trials to be heard on the Lands, reducing costs and inconvenience to not only those exercising their right to plead not guilty but also to the Courts Administration Authority.
- Providing easier access for lawyers to obtain more timely instructions, which may result in a reduction in pleas of convenience.
- Being close to the communities of Ernabella (30 kilometres) and Fregon (35 kilometres) and relatively proximate to Indulkana (178 kilometres), Mimili (112 kilometres), and Amata (108 kilometres).
- Proximity to the Umuwa Royal Flying Doctor Service (RFDS) standard aerodrome for aircraft to be used, if necessary, to transport magistrates and support staff to and from Port Augusta for each circuit, and for transportation of any prisoners to Coober Pedy or Port Augusta.⁵⁸

Time itself is a cultural phenomenon which needs to be addressed. The western legal system operates on tight deadlines. Court staff, legal representatives, and the police, all

⁵⁶ See E P Mullighan, 'Children on Pitjantjatjara Yankunytjatjara (APY) Lands Commission of Enquiry: A Report into Sexual Abuse' (2008)31, 241, Recommendation 37: 'That a process of restorative justice for the resolution of disputes in communities on the Lands be developed, implemented and periodically assessed'.

⁵⁷ See chapter 5 of this thesis, Figure 5.32.

⁵⁸ Despite being unsealed, the Umuwa aerodrome meets the high standard expected by the RFDS and is suitable for single and twin-engine aircraft operations in all but exceptionally wet conditions.

fly or drive in and out of APY communities on each day of the circuit. The communities do not share a similar culture of administrative timeframe. The present Court occupies all their time and is not seen as being part of APY community life. If the present annual circuit allocation of 24 days (four days spread over six separate circuits) were extended to 30 days, with each circuit occupying five days, the additional circuit day could be used more readily to conduct trials and to establish culturally appropriate restorative justice programs. It would also accommodate Anangu time concepts, allowing matters to be held over until the additional day instead of being adjourned for two months until the next circuit. The additional time on circuit would allow opportunities for magistrates and court staff to meet with community leaders, establishing positive connections between both groups and providing valuable judicial insights into traditionally-oriented life on the Lands.

Disadvantages include:

- A high infrastructure establishment cost. However, this would be offset by the many advantages a centrally-located court would provide to APY communities. As previously mentioned, such costs would be substantially offset against the high cost of operating the current FIFO Court.
- Having court facilities outside individual communities may result in a loss of Anangu control of the court process, providing an even more bureaucratic system. For this reason, community input into its design and operation is crucial.
- A possible disincentive for residents of Indulkana, Mimili and Amata required to attend court. To respond to this possible disincentive, further resources could be allocated for liaison officers, or existing Aboriginal Justice Officers, to visit these communities before each circuit, encouraging defendants to attend. Resources for a community bus service could also be provided to assist those requiring transport.⁵⁹
- The considerable distance to Pipalyatjara (314 kilometres) poses a problem. However, as the current circuit only visits that community every four months, the problem would not be insurmountable. Magistrates could, for example,

⁵⁹ Community buses, known as ‘bush buses’, already exist in most APY communities.

commence at Pipalyatjara as they now do, returning to Umuwa for the remainder of the circuit.

While there are problems with the establishment of a court at Umuwa, it would, at the very least, be a positive step towards providing a more culturally appropriate and effective APY court. Such a court could foster a sense of ownership by Anangu, promoting inclusiveness and enhancing self-determination. Although no other Australian jurisdiction provides a dedicated, centrally based court within other traditionally oriented remote Aboriginal communities, the proposal outlined would provide an ideal opportunity for the State Government to demonstrate leadership in the advancement of Aboriginal self-determination.

4 Court Interpreters

Appropriately trained court interpreters are essential to the effective operation of justice. As outlined in chapter 5, Anangu language interpreters are often inadequately trained and currently used in an ad-hoc fashion.⁶⁰ There are clear principles established within legislation and case law that should be observed in the use of interpreters.⁶¹

Court interpreters should be used in all cases in which English is the second language of Anangu.⁶² A standard of representation needs to be firmly established. If interpreters are not always used, there will be a tendency towards non-use because of the difficulties of organising interpreter services. Importantly, their present intermittent use places Anangu defendants at a profound disadvantage when answering charges that are not in their first language.

There is a statutory requirement that court interpreters may only act in that role if that person takes an oath or affirmation to interpret accurately.⁶³ Although such a practice tends to focus power on the official legal system, it does provide the same level of representation as experienced by speakers of immigrant languages in other court jurisdictions. Alternatively, to allow for acceptable flexibility in practice, a rule could

⁶⁰ See chapter 5 of this thesis, Figure 5.9.

⁶¹ *Evidence Act 1929 (SA)* s14; *Frank v Police (SA)* [2007] SASC 288.

⁶² See, eg, *Evidence Act 1929 (SA)* s 14.

⁶³ *Evidence Act 1929 (SA)* s 14(1a).

be developed in which the defendant is able to express objections to the use of an interpreter.

To avoid conflicts of interest, court interpreters should be used exclusively by the court and not shared between the court and defence lawyers.⁶⁴ Although setting a standard that will be difficult to achieve, the alternative poses unacceptable risks for both interpreters and lawyers. Opportunities may present themselves, however, where the more formal need for interpreters could be lessened should the recommendation of an APY Community Court proceed. There may be similar opportunities if restorative justice programs were to become more normalised with a centrally located court at Umuwa. Until such opportunities exist, preference should be given to using interpreters who meet the professional qualifications required for legal interpreting by the Australian Institute of Interpreters and Translators Inc Code of Ethics.⁶⁵ If Anangu interpreters are chosen from within APY communities, care needs to be exercised to avoid conflicts associated with traditional familial obligations.

Resources need to be put in place to train Anangu interpreters through educational facilities in each community, enabling a pool of interpreters to be available to the criminal justice system. TAFESA learning centres already exist in each of the major APY communities where interpreting training could be introduced.⁶⁶ Such an initiative, properly funded, would also provide a source of much needed community employment.

Despite repeated calls for improved interpreter services, and continual promises by the State and Federal Governments, very little has happened and improvements on the ground, particularly within the APY Lands, is minimal.⁶⁷ To continue the present ad-hoc use of interpreters at APY Courts may leave Court rulings open to challenge based on a lack of procedural fairness as demonstrated in *Frank v Police*.⁶⁸ The judiciary,

⁶⁴ See chapter 5 of this thesis, Figure 5.30.

⁶⁵ Australian Institute of Interpreters and Translators Inc, 'AUSIT Code of Ethics and Code of Conduct' (2012) <http://ausit.org/AUSIT/About/Ethics___Conduct/Code_of_Ethics/AUSIT/About/Code_of_Ethics.aspx>.

⁶⁶ See TAFESA Internet site APY Lands <<https://www.tafesa.edu.au/locations/apy-lands>>.

⁶⁷ See, eg, RCIADIC, Commonwealth, above n 11; the Mullighan Report, above n 55; South Australia, 'Child Protection Systems Royal Commission Report: *The life they deserve*' (2016); see also The Anangu Lands Paper Tracker, *Ongoing challenges for language interpreter services* <<http://www.papertracker.com.au/2017/03/ongoing-challenges-for-language-interpreter-services/>>.

⁶⁸ *Frank v Police* (SA) [2007] SASC 288.

through the State Government and the Courts Administration Authority, is responsible for the administration of court services in the Lands and it is incumbent upon them to provide an effective, efficient and professionally trained interpreter service as currently provided to speakers of migrant languages appearing before other courts. It is incongruous to go to all the trouble and expense of organising circuit courts to the Lands and not to ensure that basic defendant rights, such as access to appropriate interpreting services, are protected. The lack of appropriate interpreting services is directly linked to issues of Anangu self-determination and increased autonomy within the criminal justice system, all of which are unachievable under current APY Court circuit practices.

C *Culturally Appropriate Policing*

As revealed in chapter 4, policing practices in the APY Lands, like the operation of the APY Court, appear to operate within a cultural vacuum with little or no regard to Anangu culture, traditions and language. SAPOL officers receive little or no cultural awareness training either before or during their APY Lands postings. The current FIFO policing practices provides little incentive for officers to learn about Anangu culture and language. This is reflected in the empirical evidence outlined in chapter 4.⁶⁹ Police are often difficult to contact and Anangu have unsuccessfully requested more police be stationed on the Lands.⁷⁰ While FIFO policing is unlikely to change, it is all the more important that community police representatives be provided with responsibility and a role of crossing the cultural gap between police and APY communities.

Despite recognising the importance of Anangu culture and their notions of Indigenous self-determination, police pay little heed to cultural practices and of the need to utilise professionally trained interpreters in their official interactions with Anangu.⁷¹ Current legislation purporting to protect speakers of English as a second language relies on either knowledge by the offender of their rights to an interpreter, or awareness on the part of interviewing police.⁷² This is unsatisfactory. While the Northern Territory

⁶⁹ See chapter 4 of this thesis, Figures 4.8–10.

⁷⁰ Government of South Australia, *Country Cabinet: Anangu Pitjantjatjara Yankunytjatjara (APY) Lands, 30 April to 2 May 2017: State Government Response Summary* <<https://yoursay.sa.gov.au/decisions/countrycabinetapylands/about>>.

⁷¹ See chapter 4 of this thesis, Figures 4.13–14.

⁷² *Summary Offences Act 1953* (SA) ss 79A and 83A.

police use a mobile telephone application containing an audio recording of the police caution (the right to silence) translated to Aboriginal languages, SAPOL does not.⁷³ The often onerous and punitive police bail conditions applied to arrested offenders often reflect a lack of cultural awareness.

Although the involvement of local Anangu in policing roles on the Lands commenced in 1986, only three Community Constables are currently employed.⁷⁴ Only one official SAPOL evaluation of the scheme has been conducted and it contained narrow terms of reference and Anangu were not consulted. The positive result in SAPOL's final report therefore needs to be read with caution.⁷⁵ Recruitment of Community Constables and Police Aboriginal Liaison Officers has been difficult due to the high standards expected of them.⁷⁶ Despite a desire to have Anangu trained as sworn police officers, Community Constables are used in a liaison only role, as a bridge between Anangu communities and police.⁷⁷

1 *Indigenous Policing Practices in other Common Law Jurisdictions*

Much could be learned from Canada, where a dedicated policing program operates for First Nations communities.⁷⁸ Under this program, the Royal Canadian Mounted Police (RCMP) utilise a Community Tripartite Agreement (CTA) model, 'where a dedicated contingent of officers from the Royal Canadian Mounted Police provides policing services to a First Nation or Inuit community'.⁷⁹ Such a program offers a possible way forward for the APY Community Constable scheme. Under this model, as reported by Savvas Lithopoulos, First Nation 'community advisory bodies are established to act as the conduits between the community and the RCMP.'⁸⁰ The RCMP CTA model can be compared with SAPOL's policing within the APY Lands, albeit on a much smaller

⁷³ See Appendices 6A and 6B.

⁷⁴ SAPOL, above n 5.

⁷⁵ Ibid 7–8.

⁷⁶ ABC News, 'Community constable shortage frustrates APY Board', 15 September 2009 <<http://www.abc.net.au/news/2009-09-15/community-constable-shortage-frustrates-apy-board/1429640>>; see also ibid 19 [8.3].

⁷⁷ See chapter 4 of this thesis, Figure 4.2.

⁷⁸ Public Safety Canada, *Indigenous Policing* <<https://www.publicsafety.gc.ca/cnt/cntrng-crm/plcng/index-en.aspx>>.

⁷⁹ Ibid 16.

⁸⁰ Lithopoulos, Savvas, 'International Comparison of Indigenous Policing Models' (2007) <<https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/cmprsn-ndgns-plcng/cmprsn-ndgns-plcng-eng.pdf>>.

scale. Absent from APY policing is the community advisory bodies of this Canadian model. The lack of a formal community advisory body seems incompatible with SAPOL's acknowledgement of the need for Anangu self-determination, particularly the objective to '[e]nable Aboriginal people to develop responsibility for managing their own problems'.⁸¹ The failure of the program is evidenced by the fact that only three of the 10 Community Constable positions are currently filled, with no improvement since 2011, and by general community dissatisfaction with the Community Constable program as discussed in chapter 4.

However, it needs to be acknowledged that the situation in Canada is different from the perspective of the Anangu population and the number and size of APY Lands communities.⁸² For example, Rick Ruddell and Savvas Lithopoulos report that '[i]n the 2006 census ... about 40% of Canada's 700,000 [280,000] Aboriginal persons lived on 615 First Nations, which suggests that the average size of these Bands is less than 500 persons, and the police agencies that serve these communities tend to be small.'⁸³ By comparison, Anangu population in the APY Lands is approximately 2000, with the average population of the six major communities of Indulkana, Mimili, Fregon, Ernabella, Amata and Pipalyatjara (including Kalka), being approximately 360, but probably closer to 250 Anangu when considering the non-Aboriginal administrative workers and their families at each community.⁸⁴ As discussed in chapter 4, reasons given by the 2009 South Australian Police Minister for the poor Community Constable recruitment was that 'very few Anangu meet the selection criteria to be community constables, often because of medical grounds, a lack of education or a criminal history'.⁸⁵ This will be addressed later in recommendations under this section.

Although New Zealand has no equivalent to the APY Lands and no Community Constable program, it is nonetheless of value to compare the policing practices and

⁸¹ SAPOL, above n 5, 7.

⁸² See chapter 3 of this thesis for an overview of the APY Lands.

⁸³ Rick Ruddell and Savvas Lithopoulos, 'Officer Perceptions of Canada's 'First Nations Policing Program'' (2011) 84 *Police Journal (Canada)* 152.

⁸⁴ Ibid Figure 3.4.

⁸⁵ ABC News, Community constable shortage frustrates APY Board, 15 September 2009 <<http://www.abc.net.au/news/2009-09-15/community-constable-shortage-frustrates-apy-board/1429640>>.

strategies developed by New Zealand Police (NZP) in response to the high rates of offending and victimisation of Māori. NZP have two major policing strategies:

1. Prevention First (PF) re-orientates Police to focus on reducing offending and victimisation, in addition to response and investigation functions. PF sets out five areas of focus: families, youth, alcohol, organised crime and drugs, and road policing. Maori are disproportionately represented across all of these areas;
2. The Turning of the Tide (T4) was developed by the Police Commissioner's Maori Focus Forum and Maori, Pacific and Ethnic Services (MPES) within Police to set specific targets for reducing the disproportionate representation of Maori in offending, victimisation and crash statistics. T4 consolidated the earlier work on iwi-led Crime and Crash Plans. A key feature of T4 is the recognition of the role iwi [tribe] and Maori agencies, groups, whanau [extended family] and communities play in achieving these targets.⁸⁶

Māori have a history of relatively high employment rates in the New Zealand Police.⁸⁷ In 2014, there were 9063 constabulary members of the NZP, with 11.2 per cent being Māori, represented across all ranks, from constable to senior commissioned officers.⁸⁸ Forty-three Māori police officers were utilised as specialised Iwi Liaison Officers (ILOs) whose role is to 'support Police's relationship with Iwi/Maori and efforts to reduce offending and victimisation among Maori.'⁸⁹ The success of NZP's Māori policing strategies was reported in 2016 as being excellent, with a four per cent decrease in repeat youth victims, and a 35 per cent decrease in 'Police (non-traffic) apprehensions of Māori youth resolved by prosecution.'⁹⁰ The lead shown by the NZP Māori police strategies, including the proactive use of ILOs, demonstrates a successful

⁸⁶ New Zealand Police, 'A review of Police and iwi/Maori relationships: Working together to reduce offending and victimisation among Maori' (2014) ii <https://www.hrc.co.nz/files/4214/2550/8326/NZ_Police_2014_-_A_review_of_Police_and_Iwi_relationships.pdf>.

⁸⁷ See generally, Richard Hill, *The History of Policing in New Zealand* (V R Ward, 1986).

⁸⁸ New Zealand Police, 'Annual Report 2014' (2014) 117–120, App 5 <<http://www.police.govt.nz/about-us/publication/annual-report-2014>>.

⁸⁹ Ibid 10.

⁹⁰ New Zealand Police, 'Annual Report 2016' (2016) 24 <<http://www.police.govt.nz/about-us/publication/annual-report-2016>>.

acknowledgement of Māori culture and a commitment by the NZ Government towards Māori self-determination.

Despite recognition of the importance of Anangu self-determination, there is a current lack of Anangu-specific cultural training before or during SAPOL officers' APY postings. Directly linked to cultural awareness are issues identified in this thesis regarding the Community Constable program, the development of culturally appropriate policing practices and the provision of better access to the APY police stations.

2 *Culturally Appropriate Policing Recommendations.*

As discussed in chapter 4, a sound understanding of Anangu culture is essential if SAPOL officers are to effectively police the APY Lands. Cultural awareness cannot be left to the initiative of individual officers alone. While generous financial incentives are offered to attract officers to a posting on the Lands, there is a danger they may attract those having little vocational interest in understanding Anangu culture and language. This hypothesis is well-founded from my research, revealing that Anangu are dissatisfied with the level of cultural awareness showed by current officers on the Lands.⁹¹ Anangu are similarly dissatisfied with the overall FIFO police operations, which effectively create a social divide between Anangu and SAPOL officers.

To make postings more attractive, SAPOL could consider providing a more professional career path for officers desirous of vocational postings to the Lands. Alternatively, SAPOL could develop a strategy to hand over control of policing to communities over time, a matter that will be discussed later in these recommendations. If the present FIFO practices are to continue, it is important to improve cross-cultural awareness by police, which could be achieved by developing a specialised training program, possibly leading to tertiary qualifications. SAPOL should also consider encouraging vocationally and community-minded officers and their families for permanent APY postings, removing or reducing the need for the unpopular FIFO policing model. Similar recommendations were made in the 2008 Mullighan Report:

⁹¹ See chapter 4 of this thesis, Figure 4.10; see also Figures 4.4–5.

That at least four sworn police officers be placed in each of the new police stations to be established on the Lands ... police officers be selected not only because of experience and ability but also because of suitability of personality and attitude ... that all police officers positioned in the permanent placements on the Lands, or otherwise working on the Lands, undertake cultural training specifically designed to facilitate their working with Anangu people of the Western Desert.⁹²

Relationships of trust within a community are central to effective policing. In the Lands this can be achieved by APY police being ‘selected not only because of experience and ability but also because of suitability of personality and attitude’.⁹³ The hard work achieved by past officers could easily be undone by selecting officers who have little interest in, or regard for, Anangu culture.

A professional Anangu-specific cultural awareness program needs to be developed and established by one of the State’s leading universities having recognised expertise in Anangu culture. Serious consideration should also be given to a recognised tertiary qualification being awarded to successful participants.⁹⁴ The program should include basic Pitjantjatjara and Yankunytjatjara language training, sufficient to enhance awareness of Anangu and non-Aboriginal cultural differences. It is not expected that police officers should be fluent in NPY languages, but an appreciation of Anangu culture would be difficult without some understanding of language.⁹⁵

Cultural awareness training should continue during officers’ APY postings, conducted by Community Constables and APY community elders. This would lessen the power imbalance between SAPOL and Community Constables who are the experts on cultural matters. Members of other professional bodies, such as lawyers, nurses and midwives, and pharmacists are required to undergo annual mandatory continuing professional development (MCPD) to maintain their qualifications.⁹⁶ SAPOL members would benefit from ongoing training because only so much can be learnt from formal coursework compared with on the ground, ‘in country’ learning from the people they

⁹² Mullighan, above n 56, 247.

⁹³ Ibid.

⁹⁴ The University of South Australia (UNISA), for example, offers several Aboriginal and Australian Studies degrees. <<http://study.unisa.edu.au/aboriginal-and-australian-studies/>>.

⁹⁵ See, eg, David Ross, ‘Criminal law practice: Defending Aboriginal people’ (2007) 31(2007) *Criminal Law Journal* 332, 333.

⁹⁶ See, eg, *Rules of the Legal Practitioners Education and Admission Council (LPEA)*, Appendix CA.

are policing. Training is not just an academic exercise but relates to practice. Learning in country provides an important and more immediate feedback loop once an officer is established on the Lands, providing opportunities for important reflection as their experiences unfold.

The rewards for participation in such a program would be increased job-satisfaction, the current generous financial incentives, and tertiary qualifications, which would prove useful for future career development, and an improvement in police/Anangu relationships. Importantly, should a tertiary-based program of this nature be part of Government policy, it could be utilised by others working in the Lands, such as court staff, lawyers, corrections officers and health workers.

The present FIFO policing practices are a response to the withdrawal of permanent police services on the Lands. There is a lack of preparedness of city-based people to commit to living in remote areas of the State. There has also been a cultural shift in employment expectations, which has a direct effect on the possibility of providing culturally appropriate policing to the Lands. These factors make reform of policing on the Lands much more difficult, making the need to develop authority within communities a matter of crucial importance. The focus needs to be on improving authority through the Community Constable program and also on increasing empowerment within communities.

As previously discussed, Anangu desire Community Constables to play a greater policing role than simply acting as liaison between the police and communities. Despite the scale of the NZP Māori policing program being much larger, their results, based on Māori cultural awareness, have been positive. They clearly demonstrate sound reasons for making resources available for training Aboriginal men and women as sworn police officers. Just as importantly, such a program could be adopted state wide to improve overall police/Aboriginal relationships, and to reduce the current high incidence of adverse Aboriginal involvement in the criminal justice system.

The present Community Constable program could be substantially improved. For example, the current education, health and prior criminal record standards for Community Constables needs to be lowered. There is a desperate need for bodies on

the ground in the Lands, evidenced by the fact that only three of the ten Community Constable positions are currently filled, and there are only three Police Aboriginal Liaison Officers.

In relation to criminal records, a ban could be imposed only on those who have been convicted of a serious indictable offence. Having some experience with the justice system may prove to be valuable for Community Constables to act in that role effectively and may be an incentive for others to become involved.

The lowering of entry standards could be offset by providing Community Constable training which approaches that for current non-Anangu recruits.⁹⁷ The current SAPOL three-day Police Academy training course, followed by a period of APY Lands supervision, is inadequate.⁹⁸ Aboriginal Community Police Officers in the Northern Territory, for example, receive 20 weeks training before being posted to their remote communities as fully sworn police officers.⁹⁹ While training such as this for Community Constables may be difficult to achieve in the short term, SAPOL needs to seriously consider such a move over time to enhance authority within communities, providing a path to self-determination.

Improved training and rigorous on-the-job mentoring by APY police would be beneficial to the Community Constable program. SAPOL officers would get to know their Community Constables on a more personal level, assisting an officer's cultural integration and provide longer term learning for the Community Constable. Additional training would be required of those officers anticipating a Lands posting to become effective Community Constable mentors.

Suitable TAFE or other vocational pre-entry training courses on the Lands should be established to attract more Community Constable recruits. A TAFESA Certificate III in Police Studies is already available for persons wishing to apply to the police service as

⁹⁷ See, eg, TAFESA Internet site, Police Officer <https://www.tafesa.edu.au/xml/profile/profile_OCC09.aspx>; see also South Australia Police, The Academy <<https://www.police.sa.gov.au/join-us/achievemore/police-officer-careers/training/the-academy>>.

⁹⁸ See, eg, 101.5fm Radio Adelaide Digital, 19 October 2015 Paper Tracker, Interview with SAPOL Inspector Ian Humby <<https://radio.adelaide.edu.au/sapols-new-apy-community-constables/>>.

⁹⁹ Northern Territory Police, *NT Police Aboriginal Community Police Officer (ACPO) Application Pack* <<http://www.pfes.nt.gov.au/Police/Careers-in-policing/Aboriginal-community-police-officer.aspx>>.

sworn members.¹⁰⁰ Similar vocational training could be offered for Community Constable recruits at the existing TAFESA Learning Centres at each of the major Lands communities.

As mentioned in other recommendations in this chapter, any changes to the present Community Constable program requires close and ongoing consultation with all APY communities. This could be achieved by establishing a formal Anangu community advisory committee in line with those operating under the Canadian RCMP CTA model. Not only would such a committee contribute to the further development of the Community Constable program, but it would afford a level of empowerment to communities. It would also facilitate an improvement to future SAPOL evaluation of the program rather than relying solely on anecdotal evidence as discussed previously.

As outlined in chapter 4, Anangu reported several culturally-related matters of concern. These include not using interpreters due to a failure in recognising that simply because Anangu may speak English, their understanding is limited by their first language. As reported, police attending traditional ceremonies to arrest Anangu demonstrates a total lack of cultural awareness. These and many of the identified issues associated with APY policing practices would be substantially mitigated by the following recommendations.

Police should always use an appropriately qualified interpreter when interviewing *all* Anangu suspects, regardless of their apparent English language proficiency. Under current legislation, the present onus is on the person being interviewed to request an interpreter, or their use is left to the opinion or discretion of the interviewing officer.¹⁰¹ Relatively simple amendments should be made to the *Summary Offences Act 1953* (SA) to ensure the mandatory use of interpreters for all suspected Anangu offenders. The resources required for mandatory interpreting would be costly and, given the present dearth of qualified interpreters in APY communities, difficult to achieve, at least in the short term. The shortage of community interpreters could be addressed in the future by

¹⁰⁰ See TAFESA, Certificate III in Police Studies
<https://www.tafesa.edu.au/xml/course/aw/aw_AC00059.aspx>.

¹⁰¹ Summary Offences Act 1953 (SA) ss 78A and 83A.

APY TAFE centres, presenting much needed employment opportunities within APY communities.

As previously discussed, there are serious problems with the understanding of the police caution (the right to silence) by the majority of Anangu who speak English as a second language, or who labour under the problems associated with speaking Aboriginal English. Without assistance, there is a high risk of injustice to Anangu who also labour under the issues of gratuitous concurrence.¹⁰² These problems have been overcome to a large degree in the Northern Territory, where police use mobile telephone applications containing a short but concise translation of the caution into several Aboriginal languages, including Pitjantjatjara. A similar recording should be used by SAPOL officers. Given the cooperation between state police forces, and that there are no substantial differences between the cautions used by Northern Territory police and SAPOL, there is no reason why such a system should not be in mandatory use by APY officers.

Under the *Bail Act 1935* (SA), police bail authorities can include various bail conditions to ensure an alleged offender's later appearance before a court.¹⁰³ As discussed in chapter 4, however, bail should not be punitive; alleged offenders are to be treated as being innocent until proven guilty beyond a reasonable doubt in a competent court. When imposing bail, police should seek the advice of community elders who know about cultural reasons why bail conditions may not be appropriate. For example, bail conditions placed on Anangu which may include geographical constraints such as not being within a certain distance from a specific APY community. As part of their cultural obligations under *Tjukurpa*, Anangu are required to attend culturally significant events, such as *inmas* and funerals, and even some sporting events. A failure to so attend may bring great shame (*kunta*) to themselves, their families and their communities. As the major road networks in the Lands usually bypass communities by only a few kilometres, unless bail conditions are reflective of this, unintended breaches will occur.¹⁰⁴

¹⁰² For a full discussion on these issues, see chapters 4 and 5 of this thesis.

¹⁰³ *Bail Act 1935* (SA) s 11.

¹⁰⁴ See chapter 1 of this thesis, Figures 1.1–2 — maps of the APY and NPY Lands.

Another onerous bail condition reported to me by Anangu interviewed in 2016 is that of curfews and the need for persons on bail to present themselves before police who may check on their whereabouts. These conditions, as discussed in chapter 4, enable police to enforce bail conditions without requiring reasonable suspicion of a breach as required under the *Bail Act*.¹⁰⁵ Although bail conditions can be varied, given the difficulties Anangu experience with accessibility to police and police stations on the Lands, applications to the relevant bail authority are fraught.¹⁰⁶ The general condition of bail not to leave the State, is also onerous.¹⁰⁷ Given the close familial and cultural ties shared by all NPY Anangu, travel between contiguous communities in South Australia, Western Australian and the Northern Territory is often a cultural necessity. Again, given the difficulties in accessing police, permission to so travel would be very difficult to obtain. Most of these problems would be substantially mitigated by amendments to the *Bail Act*.

Anangu have a rich traditional life governed by *Tjukurpa*. Many traditional *inmas* are restricted to Anangu only, with several restricted to only traditionally initiated Anangu men (*watis*). It is incumbent upon SAPOL officers to be not only aware of these ceremonies, but to keep well clear of the area where they are being held. A failure to do so is seen as a serious cultural affront to Anangu. SAPOL members should only attend when they have been specifically invited by senior Anangu. As previously mentioned, the Courts Administration Authority readily cancel the APY Court circuit during traditional ceremonies and unless there are exceptional legal reasons, such as those surrounding serious criminal offences, police should not arrest any Anangu travelling to, or attending *inmas*.

To reduce criminal behaviour in the Lands, SAPOL should give serious consideration to adopting proactive policing practices, such as those in use by the New Zealand Police, discussed earlier in this chapter. It is strongly recommended such programs be initiated across the whole of the State.

¹⁰⁵ See *Bail Act 1935* (SA), ss 11 and 18.

¹⁰⁶ *Ibid* s 11.

¹⁰⁷ *Ibid* s 11(6).

Research outlined in chapter 4 reveals that Anangu have serious concerns about the accessibility and cultural appropriateness of APY police. Access to quality policing services was acknowledged by SAPOL in a submission to the 2008 Mullighan Inquiry, ‘that irrespective of distance and isolation, like all other communities, those within the Lands can rightfully expect a policing service of no lesser standard than that provided elsewhere in the State.’¹⁰⁸ Three years later, SAPOL echoed these sentiments in their 2011 evaluation of the Community Constable program, stating that ‘[r]esponse times and accessibility to policing services are pointers to quality service delivery.’¹⁰⁹

If a police service is to carry out its functions effectively and efficiently there needs to be sufficient numbers to do so and it is important that more officers be stationed on the Lands. However, an increase in SAPOL FIFO officers would require considerable expense compared with an increase in Community Constable numbers who have received commensurate improvements to their training, mentoring and statutory authority. Such a move would be more closely aligned to the requirements of Anangu, where the majority would prefer to see Anangu trained as ‘proper police’.¹¹⁰ As Community Constables are already culturally competent, increasing their numbers would satisfy SAPOL’s stated objective of facilitating Anangu self-determination. The employment of additional Community Constables would see a dramatic improvement in police/Anangu relations, affording opportunities to remove the existing cultural and social barriers, which are viewed as impediments to the present police service.¹¹¹

The present practice of escorting prisoners to Coober Pedy results in accessibility issues for APY police and Anangu. If not already a standard police practice, the absence of officers from stations for transporting prisoners could be substantially mitigated by officers conducting ‘cross-over prisoner escorts’. For example, a prisoner from Ernabella could be escorted by Ernabella officers to Fregon where they are met by officers from Mimili who would transport the prisoner to Indulkana. Marla officers

¹⁰⁸ Mullighan, above n 56, 234.

¹⁰⁹ SAPOL, above n 5, 7.

¹¹⁰ See chapter 4 of this thesis, Figures 4.2, 4.12.

¹¹¹ Ibid Figures 4.4–5.

could collect the prisoner from Indulkana and be met at some convenient half-way point by Coober Pedy police.¹¹²

Telephone access to APY police has been revealed previously in this thesis as being unsatisfactory. With mobile telephone services available at Ernabella and Amata, and planned for the remaining communities, SAPOL should provide officers with mobile telephones. These numbers should be known to community members, allowing greater access to police during their absence from stations.

Providing an accessible call-bell at the front gate of each police station and using a sign as described in chapter 4 to indicate the absence of police and their anticipated time of return would help to overcome some of the issues of accessibility to police stations.

The present security fencing is not conducive to good police/Anangu relations. These issues could be easily assuaged by removing the fencing in front of each office without unduly affecting the security of the remaining areas. Establishing lawned areas with shady trees in front of the offices, like the Western Australian police stations at Blackstone and Warburton, would provide a more welcoming appearance.

D *Legal Representation*

Part two of chapter 5 reveals shortcomings in the delivery of legal services to Anangu who find themselves in conflict with the criminal justice system. Until 2015, lawyers from the SA Legal Services Commission and the Aboriginal Legal Rights Movement (ALRM) provided legal services to the Lands. Due to funding restrictions, however, the Legal Services Commission lawyers no longer service Anangu clients in Lands or at the Coober Pedy Court.¹¹³ Legal representation now falls primarily to lawyers from ALRM at Port Augusta and Adelaide, with occasional assistance from private law firms. As discussed in chapter 5, with the cessation of Legal Services Commission representation, there are possible issues associated with client confidentiality and conflicts of interest where only one law firm represents Anangu clients. Such conflicts have a potential to add further to delays in hearing matters on the Lands. Constraints on the time lawyers spend in the Lands, combined with the rushed nature of current APY Courts and the

¹¹² Cross-over prisoner escorts were a common practice during my police service on the Lands in the 1970s and 1980s.

¹¹³ Media statement to ABC Radio National Law Report (APY Lands Circuit Court, 23 October 2013).

lack of proper facilities, result in a sub-standard level of legal representation.¹¹⁴

Lawyers do not generally attend the Lands between court circuits, resulting in last-minute instructions being obtained in the short time available before court commences. This, and a high turnover of lawyers, results in no deep relationships being formed with clients and can lead to superficial instructions being received and a possibility of clients labouring under gratuitous concurrence when speaking with lawyers. Moreover, by not attending between court circuits, lawyers are out of tune with cultural practices.

Lawyers attending the Court circuit are often relatively inexperienced in legal practice and often lacking in awareness of Anangu culture and language.¹¹⁵ The majority of Anangu interviewed in 2016 reported their belief that lawyers attending the Lands had little or no understanding of their culture.¹¹⁶ Language and cultural differences were seen as being challenging by lawyers.¹¹⁷ Although most lawyers interviewed stated that they either usually or always used an interpreter when seeking instructions from clients, most Anangu reported differently.¹¹⁸ During my research field trip to the Lands in October 2016, which coincided with an APY Court circuit, it was observed that no court or other officially-appointed interpreters were present for the whole four days. Most lawyers reported using court appointed interpreters when interviewing clients.¹¹⁹ A lack of Anangu culture and language awareness by lawyers could result in frustrated clients entering convenience pleas of guilty.¹²⁰

Men and women in Anangu society often have separate traditional lives and ceremonies and are reluctant to discuss the details with members of the opposite gender, whether Anangu or non-Anangu. Lawyers need to be aware that they may experience difficulties in representing clients of the opposite gender.¹²¹ The aggregate of these

¹¹⁴ See chapter 5 of this thesis, Figures 5.15–17.

¹¹⁵ Ibid Figures 5.20–21.

¹¹⁶ Ibid Figures 5.25–6.

¹¹⁷ Ibid Figure 5.26.

¹¹⁸ Ibid Figures 5.28–29.

¹¹⁹ Ibid Figure 5.30.

¹²⁰ ALRM, ‘Aboriginal Legal Rights Movement Inc: Annual Report 2013/14’ (Aboriginal Legal Rights Movement Inc, 2014) 90, 29; see also Nicola Gage, *Indigenous Interpreter Shortage ‘adding to high incarceration rates’ for Aboriginal people* ABC News (online) 1 March 2017 <<http://www.abc.net.au/news/2017-03-01/lack-of-indigenous-nterpreters-keeping-aboriginal-people-prison/8313176>>.

¹²¹ See Legal Services, Role of the Duty Solicitor, Gender Issues <<http://www.lsc.sa.gov.au/dsh/print/ch01.php#Ch1243Se240023>>.

issues does little for the recognition of Anangu culture or towards their objective of self-determination.

1 *Legal Representation in Other Common Law Jurisdictions*

Within all Australian jurisdictions, only lawyers who have achieved a recognised law degree, a Graduate Diploma of Legal Practice (GDLP) or an equivalent, have been admitted for practice in the relevant State Supreme Court, and who are the holders of a legal practitioner's certificate, can represent clients before a court.¹²² However, in New South Wales, a person may have the assistance of a friend or other person, called a McKenzie friend, but there are limitations.¹²³ A McKenzie friend can only assist a defendant by taking notes and offering suggestions. Lay advocates may be used by a defendant, but only under exceptional conditions subject to court approval.¹²⁴ McKenzie friends or lay advocates are not generally used in hearings conducted by the APY Court.

However, the situation is different in First Nation's Tribal Courts in the USA. For example, Whonnock describes the use of lay advocates in the Colville Tribal Court in Washington State:

Although there are many lawyers on the Colville Bar Directory, there is no requirement to be a lawyer or to attend law school to become a member of the Colville Bar. There is a requirement to pass the examination administered by the chief judge. Having lay spokespersons appearing and advocating in tribal courts lent a familiarity and comfort level for the clients appearing in tribal courts.¹²⁵

The benefits of a similar program for Anangu would be substantial and are outlined below.

¹²² See, eg, *Legal Practitioners Act 1981* (SA).

¹²³ See, eg, NSW Civil Trials Bench Book, 'Unrepresented litigants and lay advisers' (Paper presented in 2017) para 1–0850
<https://www.judcom.nsw.gov.au/publications/benchbks/civil/unrepresented_litigants.html>.

¹²⁴ *Damjanovic v Maley* (2002) 55 NSWLR 149; see also *O'Toole v Scott* [1965] AC 939; McKenzie Friends have their origins in *McKenzie v McKenzie* [1970] 3 All ER 1034.

¹²⁵ Whonnock, above n 20, 104.

2 *Recommendations for Improved Legal Representation on the APY Lands*

All practising lawyers are required to participate in annual mandatory continuing professional development (MCPD) programs to retain their practising certificates.¹²⁶ A professionally developed cultural awareness program such as that recommended for police should be developed as a specialised stream for the MCPD requirement for lawyers and other professionals working in the Lands. Alternatively, a program of this nature could be developed by ALRM in conjunction with a university and the Law Society of South Australia.

The legal representation of Anangu, and Aboriginal people more generally, should be encouraged as a criminal law specialisation, rather than as simply a temporary position in a lawyer's career. To achieve this, law firms offering such services should give preference to employing practitioners who have the appropriate cultural awareness qualifications and a demonstrated commitment to redressing Indigenous criminal legal issues. The high turnover rate of lawyers attending the Lands could be addressed by ALRM and other firms providing appropriate salary packages and working conditions to attract professionals desirous of a legal specialisation.

Lawyers need to spend more time on the Lands to obtain detailed client instructions and to build rapport with Anangu and to understand their culture. Given the present rushed circuit, lawyers need to attend the Lands between circuits. ALRM should seriously consider establishing an office and lawyers at Coober Pedy to service Anangu in that area and to permit easier access to the Lands between and during circuits. Additionally, the APY Executive should consider employing criminal lawyers who live on the Lands, offering a more readily available legal service to Anangu finding themselves in conflict with the criminal justice system. Lawyers of the appropriate gender must be used when dealing with Anangu men and women. A lawyer of each gender should be available when obtaining instructions and during APY Court circuits to ensure legal representation is culturally appropriate.

Cultural awareness is a two-way street. Not only should lawyers be aware of the nuances of Anangu culture, but Anangu need to be aware of the workings of the

¹²⁶ *Rules of the Legal Practitioners Education and Admission Council (LPEA)*, Appendix CA.

criminal justice system. At present, ALRM provide printed information to Anangu arrested on the Lands, advising them of their legal rights upon arrest.¹²⁷ This advice is provided to arrested persons by SAPOL, but the information is printed only in English, not in an APY language. ALRM should give serious consideration to having this material translated from English to Pitjantjatjara and Yankunytjatjara. ALRM lawyers and field officers are also ideally positioned to provide more formal educational programs to Anangu regarding the operation of criminal justice system in the Lands.

Where possible conflicts of interest arise, lawyers should not hesitate to seek an adjournment.¹²⁸ Importantly, lawyers should have access to their own interpreters and not share those used by the court. Using the court interpreter could expose that interpreter to a conflict of interest in which a lawyer could be ethically compromised. If an interpreter is not available, an adjournment should be sought.¹²⁹ Despite such actions causing delays, they should be seen as emphasising the need for court circuits to be of longer duration, disrupting the idea that the court must get through the list as a priority.

The use of community lay advocates, like those used in the USA Colville Courts, needs to be seriously considered for representing offenders charged with minor offences. Their use would also be effective if the APY Community Courts as previously recommended were introduced. This initiative may provide a range of employment opportunities for other community members within the criminal justice system and demonstrates the need for a paradigmatic shift in thinking by those involved in the criminal justice system.

III CONCLUSIONS

The recommendations contained in this chapter are based on empirical research conducted on the Lands, the available literature, and innovative practices from other common law jurisdictions. The recommendations focus on cultural awareness as a means to enhance Aboriginal self-determination and legal pluralism. They offer a

¹²⁷ See Appendix 5 of this thesis.

¹²⁸ *Putti v Simpson* (1975) 6 ALR 47.

¹²⁹ *Ibid*; see also *Frank v Police (SA)* [2007] SASC 288.

possible way forward but require a paradigmatic shift in thinking by all involved in the criminal justice system operating in the Lands.

Despite inalienable freehold title being granted to Anangu over the APY Lands in 1981, government control is omnipresent.¹³⁰ The State Government, following the Apology of 1997, has acknowledged Aboriginal peoples, their spiritual, social, cultural and economic practices and their recognition as the State's first peoples, yet the *Constitution Act 1934* (SA) makes it clear that such acknowledgement and recognition has no force in law.¹³¹ Although official State government policies, particularly those related to the criminal justice system, afford recognition of Indigenous self-determination, culture and language, this thesis reveals a failure to implement practices on the APY Lands consistent with these policies. Without acceptance of Anangu culture and language translated into action on the ground, there remain limited opportunities for Anangu to achieve any degree of Indigenous sovereignty.

¹³⁰ *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA) ss 13N and 13O, where the Minister may direct or suspend the APY Executive.

¹³¹ *Constitution Act 1934* (SA) s 2(2).

CHAPTER 7: CONCLUSIONS

In 1981, Anangu were granted inalienable freehold title to the 103 000 square kilometre Anangu Pitjantjatjara Yankunytjatjara (APY) Lands.¹ Three years later in 1984, a similar grant of inalienable freehold title was provided to southern Anangu over the adjoining Maralinga Tjarutja Lands.² The total area of these grants represents Anangu ownership of 20 per cent of South Australia's land mass. The *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA) creates inalienable freehold title to the APY Lands,³ with no provisions for protection of Anangu culture, traditions or language. This is reflected in section 4A of the Act:

(1) The objects of this Act are as follows:

- (a) to provide for and subsequently acknowledge Anangu ownership of the lands;
- (b) to establish Anangu Pitjantjatjara Yankunytjatjara as a body corporate and set out its powers and functions;
- (c) to provide for efficient and accountable administration and management of the lands by Anangu Pitjantjatjara Yankunytjatjara.

(2) It is an object of this Act that Anangu men and Anangu women are afforded the opportunity to have equal representation on the Executive Board.⁴

While the Act does not grant Indigenous sovereignty over the APY Lands, it is clear that the objects of the legislation are aimed at providing a high degree of autonomy for Anangu. The objects provide for not only ownership of the Lands, but also for the establishment of a body corporate, the Anangu Pitjantjatjara Yankunytjatjara, membership of which includes all Anangu.⁵ It is through this body corporate that the Anangu governance is achieved.⁶ With the granting of inalienable freehold title, APY

¹ *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA).

² *Maralinga Tjarutja Land Rights Act 1984* (SA).

³ *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA) s 15.

⁴ *Ibid* s 4A.

⁵ *Ibid* s 5.

⁶ *Ibid* Pt 2.

Anangu see the Lands as a place in which they can practice their ancestral cultural beliefs. Phillip Toyne and Daniel Vachon describe this belief as: ‘For Pitjantjatjara men and women, their land is the central and inseparable part of their being ... The land is not owned or valued in a European proprietary sense; the Pitjantjatjara do not see the land as a “thing”, separate from themselves.’⁷

Juxtaposed against the intrinsic land rights aspect of the APY Land Rights Act is the official recognition by the South Australian Government of Aboriginal peoples as traditional owners and occupants of land and waters in the State and of their continuing spiritual, social, cultural and economic practices.⁸ Although this constitutional recognition is not legally binding,⁹ policies of recognition of Indigenous self-determination continue to be a theme of Government agencies involved in the administration of criminal justice within the Lands.¹⁰

The acknowledgement that there was more than land rights alone for Anangu under the APY Land Rights Act was reinforced in *Gerhardy v Brown*,¹¹ when a challenge was mounted against the permit system required for non-Anangu visitors to the Lands.¹² Brennan J stated that the purpose of the Act was ‘restoration to the Pitjantjatjaras of the *use and management* of the lands ... and discharge the *traditional responsibilities* to which they are subject in respect of the lands.’¹³ The rationale for Brennan J’s decision can be found in the second reading speech for the original Pitjantjatjara Land Rights Bill:

The fact that agreement has been reached on such a potentially difficult question has been hailed in many quarters. We believe that the main significance of this agreement is in three parts. First, the tribes that comprise the Pitjantjatjara for the purposes of this

⁷ Phillip Toyne and Daniel Vachon, *Growing Up the Country: The Pitjantjatjara struggle for their land* (McPhee Gribble / Penguin, 1984) 5.

⁸ *Constitution Act 1934* (SA) s 2.

⁹ *Ibid* s 2(3).

¹⁰ See, eg, SAPOL, ‘Community Constable & Police Aboriginal Liaison Officer Scheme: APY & Yalata Lands: Evaluation and Options’ (South Australia Police, June 2011) 7.

¹¹ (1985) 159 CLR 70.

¹² *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA) s 19.

¹³ *Gerhardy v Brown* (1985) 159 CLR 70, 136 (Brennan J) emphasis added.

Bill are given the means to protect and preserve their culture. In this regard, it was clearly demonstrated during the negotiations that this culture is still largely intact.¹⁴

In light of this statement, it would seem that Anangu autonomy was one of the intentions behind the grant of land to Anangu in the APY Land Rights Act. The greater autonomy intended by Parliament is consistent with the claim in this thesis for an increased focus on Indigenous sovereignty and legal pluralism in the administration of criminal justice in the APY Lands. As mentioned, SAPOL have recognised Anangu self-determination as being important in their dealings with Anangu. Similar recognition is given by the Courts Administration Authority where, for example, APY Court circuits are readily cancelled during times when traditional *inmas* are being conducted on the Lands.

My own personal experiences of policing the Lands in the 1970s and 1980s, coupled with the available literature, observations and interviews in 2016, have enabled this thesis to trace changes in the approach taken by the criminal justice system towards Anangu autonomy on the Lands. My research reveals that while official government policies related to the criminal justice system afford recognition of Indigenous self-determination, there has been a failure to implement practices on the APY Lands consistent with these policies. A wide disjuncture remains in the theory and practice of recognising self-determination. To a certain extent, this has been reflected in continuing amendments to the APY Land Rights Act, allowing more control to be exercised over the Lands by the State Government.¹⁵

This thesis has traced changes in the implementation of criminal justice on the ground. The criminal justice system has been reactive rather than proactive, resulting in a loss of focus across time in achieving the objects of the APY Rights Act. The present FIFO policing and court practices are disconnected from the cultural needs of Anangu and have resulted in a criminal justice system that is little understood by them. This state of disconnection has been apparent in different degrees at different times. For instance,

¹⁴ South Australia, *Parliamentary Debates (second reading speech Pitjantjatjara Land Rights Bill)*, House of Assembly, 23 October 1980, 1387 (David Tonkin).

¹⁵ See generally Deirdre Tedmanson, *Shifting State Constructions of Anangu Pitjantjatjara Yankunytjatjara: Changes to the South Australian Pitjantjatjara Land Rights Act 1981-2001* (PhD Thesis, Australian National University, 2016).

depending on the disposition of the individual magistrates, some APY Courts have operated with more cultural sensitivity than others. Furthermore, in times before permanent police FIFO practices, there were stronger connections with Anangu communities.

The changes traced are not the result of conscious policy but, this thesis contends, have been the product of the legal system struggling to deal with distance and resource needs within Anangu communities. However, struggles with distance and resources alone have not created a disconnection. The disconnection has been exacerbated by the lack of a whole of government approach, which over time has led to ad hoc policy application. If the policy is still to provide for Anangu autonomy, it is imperative to rethink approaches to criminal justice which are undermining this policy. Given that there is official acceptance of the value of autonomy, the government should be open to, or indeed search for, reforms that are consistent with the goal of increased autonomy on the Lands. FIFO policing and court practices are symptomatic of these struggles. Underpinning this lack of policy translation on the ground is a disregard for the challenges posed by Anangu culture and language. There needs to be a rethinking of the relationship between the interaction of the criminal justice system with Anangu. There needs to be a provision of police and legal services to people on the APY Lands that does not diminish their capacity to organise their own lives.

Set against this somewhat pessimistic view are the strengths of Anangu *Tjukurpa*, a form of legal pluralism that still exists today on the Lands. *Tjukurpa* practices include Anangu laws relating to expected behaviour and dispute resolution processes which could be empowered to redress the failure of the Anglo-Australian legal system to accommodate improved justice on the APY Lands. This thesis argues that tensions between the universal rights under the law and the specific cultural needs and rights of Anangu need to be urgently addressed. At the same time, it recognises that the police are necessary, and that criminal justice must protect victims of violence on the Lands. Effective reform requires a paradigmatic shift. At the heart of this shift is the need to take seriously Anangu sovereign authority on their lands, and the potential for law to account for this authority in the provision of criminal justice services on the APY Lands.

APPENDICES

APPENDIX 1 — PHOTOGRAPHS AND ILLUSTRATIONS

Warning — Aboriginal and Torres Strait Islander people are warned that some of the following photographs contain images of deceased persons.



Figure A1.1 — Police aircraft VH-COE at Oodnadatta 1978. Loading ready for departure with two officers for a North West Aboriginal Reserve patrol. © Peter Whellum



Figure A1.2 — Ernabella (Pukatja) Police Station and quarters 1978. © Peter Whellum



Figure A1.3 — Experimental Aboriginal housing at Fregon (Kaltjiti) 1978. © Peter Whellum



Figure A1.4 — Amata Police Station 1978. © Peter Whellum



Figure A1.5 — 'Main Street' Amata 1978 (administration office on left, community store in background. © Peter Whellum



Figure A1.6 — Indulkana Police Station 1978. © Peter Whellum



Figure A1.7 — Ernabella Police Station 1986 as used by Aboriginal Police Aide Adrian Intjalki and his supervisor Senior Constable Mark Weaver. © Peter Whellum



Figure A1.8 — Ernabella Police Station (showing visiting police accommodation) 1986. © Peter Whellum



Figure A1.9 — Inside Ernabella Police Station office 1986. © Peter Whellum



Figure A1.10 — Aboriginal Police Wardens gathered at Ernabella for a social meeting with the author in 1979. © Peter Whellum



Figure A1.11 — Fregon supervising police officer, Senior Constable Bruno Arndt (left) and Police Aide Munti Smith at the Mimili Store, 1986. © Peter Whellum



Figure A1.12 — Marla Police Station hours-of-business sign 2016. © Peter Whellum



Figure A1.13 — Amata Police Station 2016. © Peter Whellum



Figure A1.14 — Mimili Police Station 2016. © Peter Whellum



Figure A1.15 — Pipalyatjara Police Aide Station 2016. © Peter Whellum



Figure A1.16 — Ernabella Learning Centre, location of Ernabella APY circuit court, October 2016. © Peter Whellum



Figure A1.17 — Interior, TAFE office, used for Ernabella APY circuit court, October 2016. © Peter Whellum



Figure A1.18 — Warburton (WA) police station 2016. © Peter Whellum



Figure A1.19 — Blackstone (WA) police station 2016. © Peter Whellum



Figure A1.20 — Coober Pedy Courthouse (side view showing front and outdoor shelter/waiting area)
© Peter Whellum



Figure A1.21 — Coober Pedy Courthouse (rear view showing holding cells) © Peter Whellum

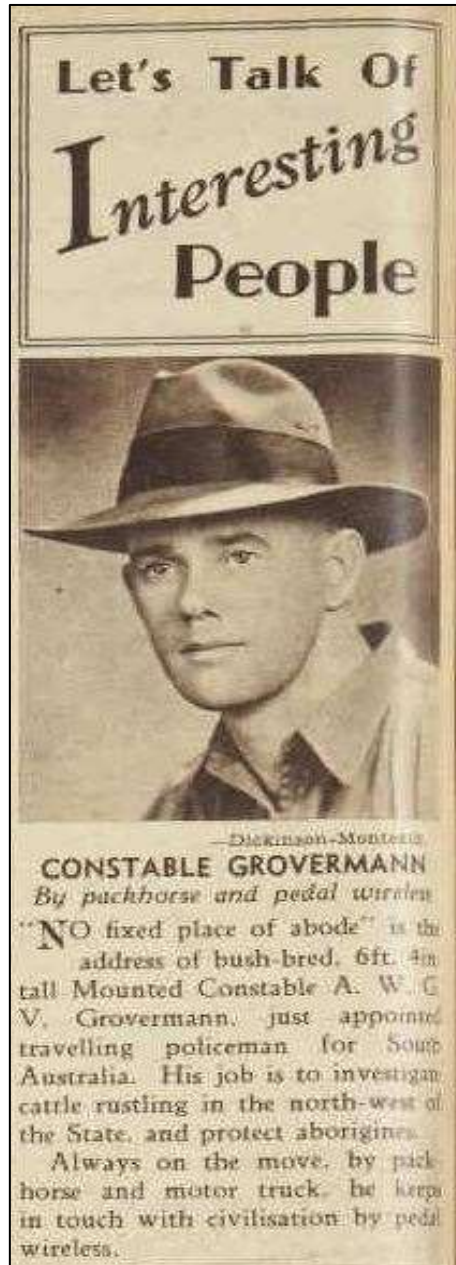


Figure A1.22 Mounted Constable Grovermann of Oodnadatta 1940.
© Women's Weekly.

APPENDIX 2 — UNIVERSITY OF ADELAIDE HUMAN ETHICS COMMITTEE (HREC) APPROVAL



**THE UNIVERSITY
ADELAIDE**

RESEARCH BRANCH
OFFICE OF RESEARCH ETHICS, COMPLIANCE AND
INTEGRITY

SABINE SCHREIBER
SECRETARY
HUMAN RESEARCH ETHICS COMMITTEE
THE UNIVERSITY OF ADELAIDE
SA 5005
AUSTRALIA

TELEPHONE t61 8 8313 6028
FACSIMILE t61 8 8313 7325
email: sabine.schreiber@adelaide.edu.au
CRICOS Provider Number 00123M

4 November 2015

Associate Professor A Reilly
Law School

Dear Associate Professor Reilly

PROJECT NO: H-2015-220

***Policing the Anangu Pitjantjatjara Yankunytjatjara (APY) Lands: a frontline in the
tensions between traditional Aboriginal culture and the criminal law***

I write to advise you that the Human Research Ethics Committee has approved the above project. Please refer to the enclosed endorsement sheet for further details and conditions that may be applicable to this approval. Ethics approval is granted for a period of three years subject to satisfactory annual progress reporting. Ethics approval may be extended subject to submission of a satisfactory ethics renewal report prior to expiry.

The ethics expiry date for this project is: 30 November 2018

Where possible, participants taking part in the study should be given a copy of the Information Sheet and the signed Consent Form to retain.

Please note that any changes to the project which might affect its continued ethical acceptability will invalidate the project's approval. In such cases an amended protocol must be submitted to the Committee for further approval. It is a condition of approval that you immediately report anything which might warrant review of ethical approval including (a) serious or unexpected adverse effects on participants (b) proposed changes in the protocol; and (c) unforeseen events that might affect continued ethical acceptability of the project. It is also a condition of approval that you inform the Committee, giving reasons, if the project is discontinued before the expected date of completion.

A reporting form for the annual progress report, project completion and ethics renewal report is available from the website at <http://www.adelaide.edu.au/ethics/human/guidelines/reporting/>

Yours sincerely

Professor P Delfabbro
Acting Convenor
Human Research Ethics Committee



THE UNIVERSITY
Of **Adelaide**

RESEARCH BRANCH
OFFICE OF RESEARCH ETHICS, COMPLIANCE AND
INTEGRITY

SABINE SCHREIBER
SECRETARY
HUMAN RESEARCH ETHICS COMMITTEE
THE UNIVERSITY OF ADELAIDE
SA 5005
AUSTRALIA

TELEPHONE +61 8 8313 6028
FACSIMILE +61 8 8313 7325
email: sabine.schreiber@adelaide.edu.au
CRICOS Provider Number 00123M

Applicant: Associate Professor A Reilly

School: Law School

Project Title: *Policing the Anangu Pitjantjatjara Yankunytjatjara (APY) Lands: a frontline in the tensions between traditional Aboriginal culture and the criminal law*

THE UNIVERSITY OF ADELAIDE HUMAN RESEARCH ETHICS COMMITTEE

Project No: H-2015-220

RM No: 0000021019

APPROVED for the period until: **30 November 2018**

Thank you for the detailed response dated 23.10.15 to the matters raised by the Committee. It is noted that this study will be conducted by Peter Whellum, PhD candidate.

Refer also to the accompanying letter setting out requirements applying to approval.

Professor P Delfabbro
Acting Convenor
Human Research Ethics Committee

Date: 4 November 2015

APPENDIX 3A — PERMIT TO CONDUCT RESEARCH AND TRAVEL WITHIN APY LANDS

**63283
TOYOTA
XHL158**

6 / 2016

Permit to Enter Anangu Pitjantjatjara Yankunytjatjara Lands

Firstname PETER	Surname WHELLUM	Permit Number 63283
Date of Entry: 1/06/2016	Date of Departure: 30/06/2016	
Proposed Route of Travel: ALL COMMUNITIES		
Purpose of Entry: TO CONDUCT PHD(LEGAL)RESEARCH WITHIN APY LANDS		

GENERAL CONDITIONS OF ISSUE:

1. This permit does not authorise the entry of any person to a dwelling or living area of a camp occupied by, or belonging to, an Aboriginal land specified has been served upon the Traditional Owners concerned. The permit holder is responsible to ensure that Aboriginal communities are informed of their intention to visit. 2. This permit is valid only to enable the permit holder to perform the duties associated with their visit. 3. This permit must be carried at all times while the holder is on the Lands and produced for inspection on demand. 4. This permit may be revoked at any time. 5. The permit holder must comply with any laws currently in force concerning the sale and possession of alcohol and/or other volatile substances on the Lands. 6. This permit may be revoked at any time. 7. In the event of a valid permit being revoked for any reason, the permit holder shall immediately leave the Anangu Pitjantjatjara Yankunytjatjara Lands. 8. Executive members, Community Councilors and Anangu Pitjantjatjara Yankunytjatjara staff may inspect permits and may at any time give direction to permit holders in relation to their conduct and activities on the Lands. 9. Any special conditions are noted on the attached form. 10. The vehicle sticker must be displayed on the windscreen of your vehicle while the holder is on the Lands. 11. The body of the form is for the permittee's information only. 12. Any Agency staff, Employee or Contractor working on the APY Lands requires a National Police Clearance Certificate. 13. All artworks purchased by the permit holder must be declared and accompanied by the appropriate sales documentation from the relevant community art centre. Except in the case of approved galleries, the permit holder shall not deal privately in the works of Pitjantjatjara Yankunytjatjara artists. 14. No work or consultations will be undertaken unless first approved in writing by the APY Executive Board or its delegate. 15. No premises will be negotiated for, occupied or used without a lease or licence arrangement approved by the APY Executive Board. 16. You will co-operate with and answer questions asked by any investigator appointed by APY. 17. Holders of permits shall not: a) make representations about the nature and extent of Anangu legal rights under the APY Land Rights Act; the powers and functions of APY ownership of the lands by APY; and/or APY's entitlement to exclusive possession of the Lands and buildings erected on the Lands and/or APY's entitlement to collect the rents and profits from the Lands or buildings erected thereon; b) occupy buildings or other areas without the consent of APY; or c) collect rents for buildings or lands or other money from Anangu or communities without the consent of APY.

Anangu Pitjantjatjara Yankunytjatjara
PMB 227 Umuwa, via Alice Springs, NT 0872 - Phone (08) 8954 8104 - Fax (08) 8954 8110

63283
PETER WHELLUM
1/06/2016 TO 30/06/2016
Anangu Pitjantjatjara Yankunytjatjara
(Pursuant to the APY Lands Rights Act 1981)
THIS CARDHOLDER HAS PERMISSION BETWEEN 1/06/2016 AND 30/06/2016 TO TRAVEL TO ALL COMMUNITIES

APPENDIX 3B — PERMISSION FROM APY EXECUTIVE TO CONDUCT RESEARCH



CONSENT FORM — APY EXECUTIVE

1. The attached Information Sheet has been read by us and we, the APY Executive, agree to the following research project being conducted in the APY Lands' Communities during April 2016:

Title:	'Policing the Anangu Pitjantjatjara Yankunytjatjara (APY) Lands: a frontline in tensions between traditional Aboriginal culture and the criminal law.'
Ethics Approval Number:	H – 2015 – 220

- The project, so far as it affects our communities, has been fully explained to our satisfaction by the researcher, Peter Whellum. We give our consent freely.
- We understand the purpose of the research project and it has also been explained that our involvement may not be of any benefit to us personally.
- We have been informed that, while information gained during the study may be published, persons who help will not be identified and their personal details will not be divulged.
- We understand that we are free to withdraw from the project at any time.
- Our APY Executive would like ~~to~~ ~~not require~~ a copy of the final research information.
- We are aware that we should keep a copy of this completed Consent Form and the attached Information Sheet.
- We have been given a copy of the Survey Questions Peter Whellum will be asking members of the APY communities.

APY Executive representative to complete:

Name: Richard K Position: General Signature: _____

Date: 13/4/16

Witness to complete:

I have described the nature of the research to Anton Baker
(Print name of APY Executive representative)

and in my opinion she/he understood the explanation.

Signature: _____

Position: APY Executive Date: 13/4/16
Board member

APPENDIX 4A — COPYRIGHT PERMISSIONS — MAP 1

From: Newman, Paul (DECD) [<mailto:Paul.Newman@sa.gov.au>]
Sent: Wednesday, 20 September 2017 9:17 PM
To: 'Peter Whellum'
Subject: RE: Request to use copyright APY Lands map in PhD thesis
[SEC=PROTECTED]

PROTECTED

Hi Peter,

Happy for you to use this Map with appropriate references.

Regards
Paul Newman
Education Director

Education Director-Paul Newman Inner West Partnership & Anangu Lands Partnership
Department for Education and Child Development | 20 Beatty Street, Flinders Park SA 5025
t (08) 8416 7341 | e paul.newman@sa.gov.au w www.decd.sa.gov.au
[Facebook](#) | [Twitter](#) | [LinkedIn](#)



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From: Peter Whellum [<mailto:pwhellum@bigpond.com>]
Sent: Monday, 18 September 2017 11:02 AM
To: Newman, Paul (DECD)
Subject: Request to use copyright APY Lands map in PhD thesis

Dear Paul,

I am a PhD candidate with the University of Adelaide Law School and my thesis title is 'The Administration of Justice on the Anangu Pitjantjatjara Yankunytjatjara (APY Lands: a front line in tensions between traditional Aboriginal culture and the criminal law.'

Within my chapter 1 (Introduction) I would like to use a map of the APY Lands which appears on your Internet site at: <http://www.aeseo.sa.edu.au/map.htm>

Although the map has no copyright symbology, I am assuming that you do in fact own the copyright and am seeking your written permission to use it in my thesis. It would be clearly

Appendix 4

footnoted as originating from your Internet site and that copyright permission has been received. (I have cut and pasted a copy of this map below) Unfortunately, an email sent to info@aseo.sa.edu.au has been returned as undeliverable – similarly, several attempts over the past two weeks to telephone the Adelaide phone number of (08) 8359 4626 have also been unsuccessful.

Can you please advise if I am able to obtain your permission to reproduce this map for use with my PhD thesis? Alternatively, can you advise me to whom my request should be addressed?

Annie from the Ernabella Anangu School suggested I make email contact with you.

Kind Regards

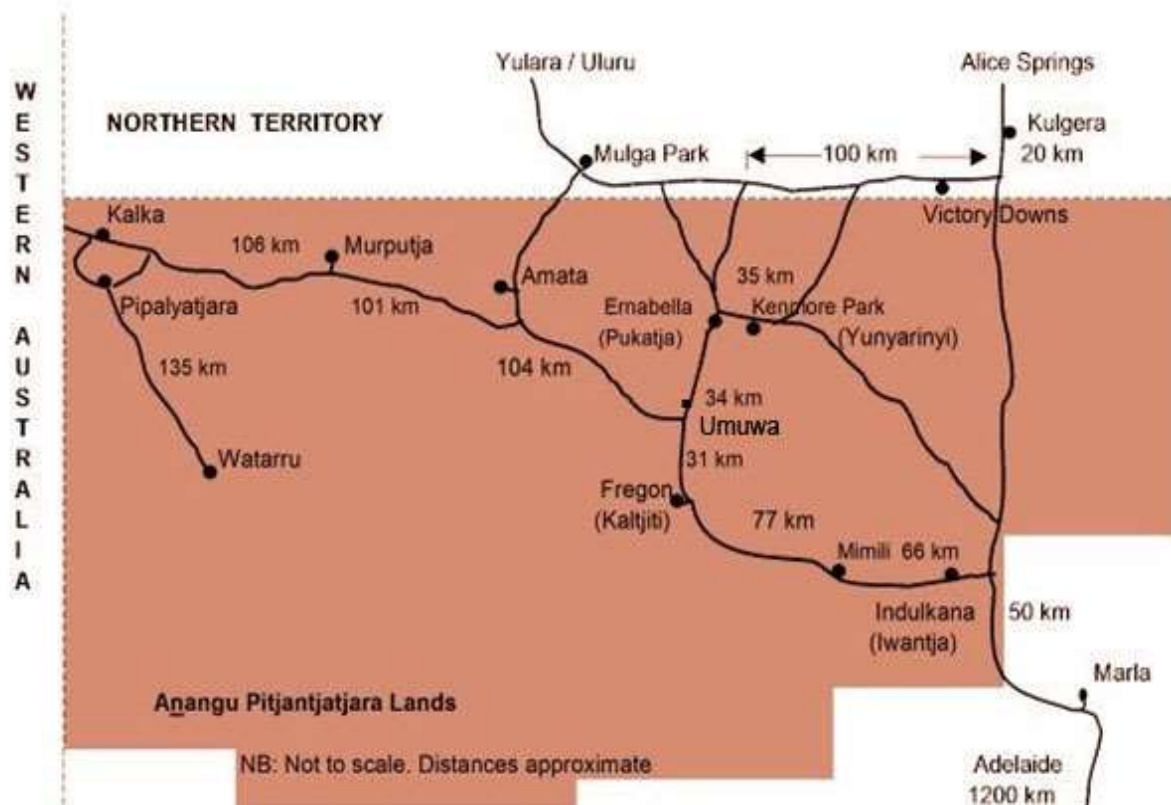
Peter Whellum
LLB (Hons 1), Grad. Dip. Legal Practice, Assoc. Dip. Arts (Aboriginal Studies)
PhD candidate a1683129
University of Adelaide Law School

PO Box 390
Quorn SA 5433

(08) 8648 6504

Email: pwhellum@bigpond.com or peter.whellum@adelaide.edu.au

18 September 2017



APPENDIX 4B — COPYRIGHT PERMISSIONS — MAP 2

I don't see any problem with the map being used.

Regards

Robert Bradshaw PSM

Director, Policy Coordination

Solicitor for the Northern Territory

Department of the Attorney-General and Justice

Level 8, 68 the Esplanade

Old Admiralty Towers

GPO Box 1722, Darwin NT 0801

Telephone: +61 (08) 08 8935 7403

Mobile: +61 0401 116 714

Fax: +61 (08) 8935 7414

Email: robert.bradshaw@nt.gov.au

Web: <http://www.nt.gov.au/justice/>

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From: Karlo Belleza On Behalf Of AGD WebAdministrator

Sent: Friday, 17 November 2017 9:33 AM

To: Robert Bradshaw <Robert.Bradshaw@nt.gov.au>

Subject: FW: Request for permission to use Cross Border NPY Lands map for PhD thesis - Peter Whellum

Good morning Robert,

DCIS told me to contact you regarding this matter.

Someone requested to use the image (map) on this page: <https://nt.gov.au/law/crime/cross-border-justice>

Is it okay for them to use it?

Kind Regards,

Karlo Belleza

Multi-Media and Communication Officer
Department of the Attorney-General and Justice
Northern Territory Government

Floor 4, Heritage Building, 6 Knuckey Street, Darwin
GPO Box 3196, Darwin, NT 0800

p ... 08 8935 7584

e ... karlo.belleza@nt.gov.au

e ... agd.corporatecommunications@nt.gov.au / agd.webadministrator@nt.gov.au

w ... <https://justice.nt.gov.au/>

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Our Values: **Commitment to Service** | **Ethical Practice** | **Respect** | **Accountability** | **Impartiality** | **Diversity**

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From: Shandra Harris

Sent: Thursday, 16 November 2017 1:43 PM

To: AGD WebAdministrator <NTDCS.WebAdministrator@nt.gov.au>

Subject: FW: Request for permission to use Cross Border NPY Lands map for PhD thesis
- Peter Whellum

Hello,

As Shawn is away –

Tracy Luke believes that the below request should go to Shawn or media?

Thanks

Kind Regards,

Shandra Harris

Executive Assistant to the Director, Community Corrections
NT Correctional Services
Department of the Attorney-General and Justice
Northern Territory Government

4th Floor, Heritage Building, 6 Knuckey Street, Darwin NT 0800
GPO Box 3196, Darwin NT 0801
Telephone: (08) 8935 7681

E: shandra.harris@nt.gov.au

Web: www.nt.gov.au/justice/

The information in the email is intended solely for the addressee named. It may contain legally privileged or confidential information that is subject to copyright. If you are not the intended recipient you must not use, disclose, copy or distribute this communication. If you have received this message in error, please delete the email and notify the sender. Use or transmittal of the information in this email other than for authorised NT Government business purposes may constitute misconduct under the NT Public Sector Code of Conduct and could potentially be an offence under the NT Criminal Code. No representation is made that this email is free of viruses. Virus scanning is recommended and is the responsibility of the recipient.



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LINK UP AND SAY **NO MORE** TO FAMILY VIOLENCE

From: Graeme Pearce

Sent: Wednesday, 15 November 2017 1:13 PM

To: Shandra Harris <Shandra.Harris@nt.gov.au>

Subject: FW: Request for permission to use Cross Border NPY Lands map for PhD thesis
- Peter Whellum

Hi Shandra,

I received this request on Melbourne Cup day but forgot to forward it on. Thanks

Graeme Pearce

Director Cross Borders Programs

Tel: 08 8951 5437

Fax: 08 8951 5415

Mob: 042 8107 317



Proudly working with White Ribbon to create a safer workplace
Australia's campaign to stop violence against women

From: Peter Whellum [<mailto:pwhellum@bigpond.com>]

Sent: Wednesday, 15 November 2017 11:28 AM

To: Graeme Pearce <Graeme.Pearce@nt.gov.au>

Appendix 4

Subject: RE: Request for permission to use Cross Border NPY Lands map for PhD thesis
- Peter Whellum

Hello Graeme,

Wonder if you have any news re copyright of the map yet?

Cheers,

Peter

From: Graeme Pearce [<mailto:Graeme.Pearce@nt.gov.au>]

Sent: Tuesday, 7 November 2017 2:35 PM

To: 'Peter Whellum' <pwhellum@bigpond.com>

Subject: RE: Request for permission to use Cross Border NPY Lands map for PhD thesis
- Peter Whellum

Hi Peter,

I will talk to people about this on Friday. I will not get any sense today from Darwin. As this map is not copy-writed I doubt there will be a problem with it. I am away the next 2 days. Cheers

Graeme Pearce

Director Cross Borders Programs

Tel: 08 8951 5437

Fax: 08 8951 5415

Mob: 042 8107 317



Proudly working with White Ribbon to create a safer workplace
Australia's campaign to stop violence against women

From: Peter Whellum [<mailto:pwhellum@bigpond.com>]

Sent: Tuesday, 7 November 2017 12:38 PM

To: Graeme Pearce <Graeme.Pearce@nt.gov.au>

Subject: Request for permission to use Cross Border NPY Lands map for PhD thesis -
Peter Whellum

Mr Graeme Pearce,
Director Cross Borders Program

Dear Graeme,

As discussed during our telephone conversation this afternoon, I am seeking permission to use a map of the Cross Border Justice regions of SA, NT and WA as appears in the NT Cross Border Justice Internet site at: <https://nt.gov.au/law/crime/cross-border-justice> The map would be used in my PhD thesis. To refresh your mind about my research:

I am a remote PhD candidate with the University of Adelaide Law School. My thesis is entitled: 'The administration of justice in the Anangu Pitjantjatjara Yankunytjatjara (APY) Lands: a front line in tensions between traditional Aboriginal culture and the criminal law.' My academic supervisors are Professor Alex Reilly of the Adelaide Law School, and Professor Amanda Nettelbeck of the History faculty. My PhD researcher profile is available at

<https://researchers.adelaide.edu.au/index.php/profile/peter.whellum#career> My research has Human Research Ethical Committee (HREC) approval from the University of Adelaide – approval H2015-220 – and I obtained permission from the APY Executive in March 2016 to conduct research in the APY Lands and to interview volunteer Anangu participants. This was conducted over three separate research field trips to the Lands in 2016.

My thesis examines issues identified on the APY Lands through the lenses of legal pluralism and sovereignty and has been informed by interviews with Anangu, magistrates and lawyers – these interviews were conducted in 2016. The issues I have identified are all with respect to APY Lands policing practices, the administration of justice by the APY Courts and in the provision of legal representation by lawyers who visit the Lands during the court circuits. My research revealed that while much has been written about the history, socioeconomics, culture and language of the APY Lands and its people, there is a dearth of information about the administration of justice, particularly so from the perspective of Anangu themselves. My approach to the research is innovative in a number of ways, combining a legal historical focus with a theoretical framing issue around the concepts of sovereignty and legal pluralism. The aim of my research is to provide alternative means for the administration of justice within the Lands that takes into account the specific sovereignty and cultural needs of Anangu.

In chapter 1 of my thesis, which contains introductory matters such as the reasons for the research, research methodology and a literature review, etc, I would like to include a map of the Ngaanyatjarra Pitjantjatjara Yankunytjatjara (NPY) which shows the APY Lands and the contiguous areas of south western NT and the central western regions of WA. The map shown on the Cross Border Internet site, and attached to this email, would be perfect for this chapter and quite relevant to my thesis as I discuss, in general terms, the whole NPY region.

The specifications for doctoral thesis writing makes it clear that I require permission to use any copyright materials and am therefore seeking your written approval to make use of this map. I will, of course, include full details of the source of this map in my thesis, including your permission should that be forthcoming.

I would also be more than happy to supply a PDF version of my PhD thesis to your organisation when it is finalised.

Should you have any questions, please don't hesitate to contact me.

Wishing you the very best for your forthcoming retirement.

Kind Regards

Peter

Appendix 4

Peter Whellum

LLB (Hons 1), Grad. Dip. Legal Practice, Assoc. Dip. Arts (Aboriginal Studies)

PhD candidate a1683129

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Email: pwhellum@bigpond.com or peter.whellum@adelaide.edu.au

7 November 2017

(08) 8648 6504

APPENDIX 5 — ABORIGINAL LEGAL RIGHTS ARREST INFORMATION SHEET



**Aboriginal
Legal
Rights
Movement
Inc**

ABN 32 942 723 464

ADELAIDE
321-325 King William Street
Adelaide SA 5000
DX 239
Ph (08) 8113 3777
Fax (08) 8211 7618 (Admin)
(08) 8113 3755 (Legal)

FREE CALL (In SA only)
1800 643 222

CEDUNA
cnr East Tce & Merghiny St
PO Box 419
Ceduna SA 5690
DX 51904
Ph (08) 8625 2432
(08) 8625 2200
Fax (08) 8625 3093

MURRAY BRIDGE
27 Beatty Terrace
PO Box 763
Murray Bridge SA 5253
DX 51215
Ph (08) 8532 4788
Fax (08) 8531 1015

PORT AUGUSTA
12 Church Street
PO Box 1771
Port Augusta SA 5700
DX 51023
Ph (08) 8642 4366
Fax (08) 8642 4650

PORT LINCOLN
30 Ravensdale Rd
Port Lincoln SA 5606
Ph (08) 86826677
Fax (08) 86826616

THIS INFORMATION SHEET IS FOR ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLE WHO HAVE BEEN ARRESTED BY SOUTH AUSTRALIAN POLICE AND CHARGED WITH AN OFFENCE

PLEASE READ THIS INFORMATION CAREFULLY

ALRM advises you:

1. Use your right to a phone call in order to contact an Aboriginal Field Officer or ALRM Solicitor. **Ask the Officer in charge of this Police Station for the ALRM phone number so you can get more advice about exercising your rights when you are arrested.**

Ask the Aboriginal Field Officer on the telephone whether they should come to the Police Station where you are arrested to discuss things and help you.

2. **DO NOT** answer any questions (except questions the law says you must answer, like giving your real name and address and to truly answer questions about driving a motor vehicle).

3. **Make sure** you know exactly what offence you have been charged with.

4. **DO** make sure that the Police have advised you of your rights. The Police have to advise you of the things listed below and allow you to do them:

a) You have the right to make one phone call to a relative or friend to tell them where you are. A Police Officer has to be with you when you make the call;

b) You are allowed to have a Solicitor, relative or friend with you when you are being asked questions by the Police. **WE BELIEVE IT WILL BE GOOD FOR YOU TO ASK FOR A SOLICITOR OR AN ABORIGINAL FIELD OFFICER;**

c) If you do not speak good English, ask for an interpreter to help you understand what is being said;

d) After you have been arrested, Police may wish to search your clothing or your body. If it is an intrusive or intimate search, police may need to have a doctor or registered nurse to carry it out and you will have certain rights including the right to an interpreter, if you are not reasonably fluent in English.

Police may also want to get proof of your actual identity or they may want to get samples and do tests for the investigation of offence. Laws authorise them to do this. Police may want to take photographs or take forensic samples (swabs, blood and hair samples and fingerprints etc).

Depending on the kind of forensic examination, police may need to get approval from a Senior Police Officer for what they want to do, before they do it. Youths and protected persons have special rights in forensic examinations. Again, you have the right to an interpreter if you are not reasonably fluent in English. You have other rights in the actual conduct of the forensic examination, which you may wish to discuss with a Field Officer or get specific legal advice about.

APPENDIX 6A — PRE-2015 NT POLICE CAUTION TRANSLATED TO PITJANTJATJARA

The English version of the standard NT Police caution (right to silence): ‘You are not obliged to say anything unless you wish to do so. If you do say anything it may be produced as evidence in court. Do you understand that?’ The following is a Pitjantjatjara translation, demonstrating the complexities of cross-language interpretations.

1. Kuwaripa tjukurpa nyuntula wangkanyi wangka utingku nyuntu uti kulintjaku. Tjinguru Pulitjamunungku nyuntula tarapulangu tjapintjikitja mukuringanyi. Palu uti paluru taipi nyangatja warara wangkatjanganma wangka nyuntumangka nyuntu kulintjaku nyuntula tjapintja kuwaripangka. Palya!
2. Pulitjamunungku nyuntunya witira kanyini panya tarapula ngarangi, munu paluru kulini tjinguru nyuntu ninti tarapula nyanga palumpa. Munu paluru mukuringanyi tarapula nyanga palunya nyuntula tjapira kulira nyuntulanguru nintiringkunyitjikitja.
3. Tjinguru Pulitjamunu nyuntumpa mukuringanyi nyuntu palula rawa nguwanpa nyinanytjaku. Tjinguru paluru angangu kutjupa tjuangka kulukulu tjapilku tjanalanguru kulu kulira nintiringkunyitjikitjangku. Ka Pulitjamunungku angangu nyara palula tjanala wangkanyitjikitjangku paluru nyuntunya kuwaripangu kanyilku. Tjinguru nyuntunya tjukutjuku nyinanytjaku kanyilku, munta tjingurunta kanyilku rawa nguwanpa nyinanytjaku.
4. Palu Pulitjamunungku tarapula nyanga palunyatjara nyuntula wangkanyitja kuwaripangka uti paluru tjukurpa ara nyanga kutjara kutjara wararangu nganmanytju kulinma wantinytja wiyangu. Ka taipi nyangangka ngayulu kuwari tjukurpa ara nyanga palunya tjananya nyuntula utini nyuntumpa wangka walytjangka nyuntu uti kulintjaku. Ka taipi nyanga paluru wiyaringkunyangka malangka Pulitjamunungku nyuntula tjapilku nyuntu nyaaku mukuringanyi, nyaa wangkanyitjikitja. Ka nyuntu kuwari purkarangu kulinma ara nyanga palula tjanala ngayulu nyuntula wangkanyangka. Palya!
5. Ara nyanga paluru tjana nyuntula tjakultjunanyi alatji:
6. Nyuntu angangu kutjara altinytjaku ngaranyi pitjala nyuntunya alpamilantjaku.
7. Tjinguru nyuntu nyuntumpa malpaku mukuringanyi pitjala nyuntula tjungu nyinara nyuntunya rapantjaku. Ka nyuntu mukuringkula Pulitjamunungka tjapintjaku ngaranyi, ka nyuntu tjapinnyangka paluru ankula ngurira nyuntulakutu ngalya-katiku. Ka Pulitjamunungku tarapula nyanga palunyatjara nyuntula tjapintja kuwaripangka nyuntumpa malpangu nyuntula wirkara nyuntunya alpamilalku Pulitjamunungka nyaa wangkanytjaku.
8. Ka nyuntu tjinguru Ingkilitjaku ngurpa nguwanpa ngaranyi, munu tjukutjuku kutju kulilpai. Munu nyuntu tjinguru mukuringanyi nyuntumpa wangkaku nintingu pitjala nyuntunya alpamilantjaku. Ka nyuntu mukuringkla Pulitjamunungka tjapintjaku ngaranyi, ka paluru nyuntula kulilku munu paluru ankula mantjilku angangu nyara palunya, ka paluru pitjala ara uwankara Pulitjamunungku wangkanytja nyuntula utira wangkaku nyuntumpa wangka walytjangka nyuntu kulintjaku. Tjinguru nyuntu ninti angangu nyara palumpa, munta tjinguru nyuntu ngurpa palumpa, palu paluru nyuntunya alpamilalku alatjitju.

9. **Uwa, kuwari nyanga ngayulu tjukurpa kuranyitja nyuntula wangkara utini ara nyanga nampa 1-nguru, panya Pulitjamunungku nyuntunya witira kanyinnyangka nyuntu walytja tjuṯangka tjakultjunkunytjaku ngaranyi tjana nyuntunya kulintjaku.**
10. *Ara nyanga paluru nyaa wangkanyi Pulitjamunungka?*
11. Paluru nyuntunya kumpilpa kanyintjaku wiya ngaranyi, nyuntumpa walytja tjuṯangka nyuntunya puṯu ngurintjaku. Palulanguru Pulitjamunungku nyuntunya witira kanyintjatjanungku nyuntula tjapintjaku ngaranyi alatji, “Nyuntu walytja tjuṯangka wangkanytjikitja mukuringanyi?” Ka nyuntu uwanmankunyangka Pulitjamunungku nyuntunya alpamilalku nyuntu aṅangu nyara palula tjanala wangkanytjaku.
12. *Ara nyangangu nyuntula ngapartji nyaa wangkanyi?*
13. Ara nyangangu nyuntula alatji wangkanyi:
14. Nyuntu mukuringkulampa ringamilara wangkanytjaku ngaranyi nyuntumpa walytja tjuṯangka munu tjanala utingku tjakultjunkunytjaku ngaranyi yaaltjingka nyuntunya Pulitjamunungku kanyini.
15. Palu tjinguru nyuntu mukuringkuntja wiya nguwanpa nyuntumpa walytja tjuṯangka wangkanytjaku, palu nyuntu tjinguru mukuringanyi aṅangu kutjupangka wangkanytjikitja. Palatja palya. Nyuntu wangkanytjaku ngaranyi alatjiṯu aṅangu nyara palula.
16. Uwa, nyuntu tjinguru nyara palula tjanala tjakultjunkunytjikitja mukuringanyi, munta tjinguru nyuntu wantinyi palula tjanala wangkanytja wiyangu. Kanta Pulitjamunungku kulu nyuntunya ugṯuntja wiyangu wantiku nyuntu mukuringkula kutju walytjangku kulira tjanala wangkanytjaku.
17. **Ka kuwari nyanga ngayulu tjukurpa kutjupalpi nyuntula wangkara utini ara nyanga nampa 2-nguru, panya Pulitjamunungku nyuntunya witira kanyinnyangka nyuntu malpa nyuntumpa altinytjaku ngaranyi, tjinguru aṅangu nyuntumpa walytja mulapa. Ka Pulitjamunungku tarapula nyara palunyatjara nyuntula tjapintja-arangka nyuntumpa malpangku pitjala nyinara nyuntunya alpamilalku.**

18. *Ka ara nyanga paluru nyuntula nyaa wangkanyi?*
19. Nyuntu malpaku mukuringkula Pulitjamunungka tjapila alatji, “Wanyutju ngayuku malpa ankula ngurira ngalya-kati pitjala ngayula tjunguringkula ngayunya alpamilantjaku.” Ka mulapaŋu ankula mantjilku malpa nyuntumpa ka nyuntula pitjala tjunguringkuku munu nyuntunya alpamilalku Pulitjamunungku tjapinnyangka rapangku wangkanytjaku. Tjinguru nyuntu kulilku tarapula nyara palunyatjara tjakultjunkunytkitjangku, munta tjinguru nyuntu kulilku wangkanytja wiya pilunpa nyinanytkitjangku. Tjingurun puŋu kulirampa nyuntumpa malpangka tjapila munu nyupali kutjarangku wangkara kulila nyanga tjukurpa kutjaranguru nyuntu yaaltji ngurkantananyi. Nyupalinku mukuringkula mauntalpanku wangkara kulila. Ka nyupali wangkara wiyaringkunyangka malangka nyuntumpa malpa nyuntula tjunguŋu nyinanytjaku ngaranyi Pulitjamunungku nyuntula ara tjuŋa tjapinnyangka.
20. Tjinguru nyuntu nyuntumpa malpaku mukuringanyi nyuntula pitjala tjunguringkula nyinanytjaku, munta tjinguru nyuntu mukuringkunytja wiya. Palatja palya! Nyuntu walytjangku kulintjaku ngaranyi. Tjingurun wantiku, munta tjingurun altiku. Ka Pulitjamunungku nyuntunya puŋu wiymananyi.
21. *Palu malpa ngananyan ngurkantankuku pitjala nyuntunya alpamilantjaku?*
22. Wiya, panya nyuntumpa malpa mulapa kutju ngurkantanama, panya paluru nyuntula wangkanyangka nyuntu palumpa mulamularingkupai, palunya. Kanta paluru pitjala nyuntunya alpamilalku Pulitjamunungka nyinara nyuntu rapangku wangkanytjaku.
23. *Ara nyangangu nyaa wangkanyi Pulitjamunungka ngapartji?*
24. Tjinguru nyuntu malpa nyuntumpa pitjanytjaku mukuringkunytja wiyangampa Pulitjamunungku nyuntula kutjunga tjapilku tarapula nyanga palunyatjara.
25. Palu nyuntu tjinguru nyuntumpa malpa pitjala nyuntula nyinanytjaku mukuringkulampa nyuntu uti Pulitjamunungka tjakultjunama agangu nyara palumpa ini. Ka Pulitjamunu kutjupangu ankula arkara ngurilku nyuntumpa malpa, munu ngurira nyakula palunya ngalya-katiku nyuntulakutu. Ka nyuntumpa malpa wirkankunytja kuwaripangka Pulitjamunungku uti tarapula nyanga palunyatjara nyuntula tjapintja wiyangu wantima munu paŋanma palumpa. Ka malpa nyuntumpa pitjala nyuntula tjunguringkula nyupali warara wangkara kulila. Ka nyara palulanguru nyupali tjungungku wangkara wiyaringkunyangka kutju Pulitjamunu paluru nyuntula tjapintjaku ngaranyi tarapula nyanga palunya.
26. **Kana kuwari nyanga tjukurpa kutjupalpi nyuntula wangkara utini ara nyanga nampa 3-nguru, panya wangka kampa kutjaranguru utira wangkapainya, palunya.**

27. *Warka nyaa nyanga paluru palyalpai?*
28. Nyanga paluru alatji palyalpai, panya paluru ninti nganampa wangkaku munu Ingkilitjaku kulu. Munu uwankara nyuntu wangka walytjangku wangkanyangka paluru Ingkilitjangku wangkaku Pulitjamunungku kulintjaku ara uwankara nyuntumpa tjukurnguru. Munu uwankara Pulitjamunungku Ingkilitjangku nyuntula wangkanytja paluru nyuntumpa wangkangu nyuntula tjakultjunkuku nyuntu kulintjaku uwankara nyuntula wangkanytja.
29. *Ara nyangangu nyaa wangkanyi palula tjukurpa panya wangka kampa kutjaranguru utira wangkapaila?*
30. Angangu panya wangka kampa kutjaranguru utira wangkapainya paluru ini nyangatja 'interpreter'. Paluru nyuntula tjaalytju wangkanytjaku wiya ngaranyi tarapula nyara palunyatjara. Tjinguru nyuntu palula tjapintjikitja mukuringanyi, "Ara nyaaga wangkaku Pulitjamunungka?" Palu wiya, paluru nyuntunya wangkara nintintjaku wiya ngaranyi nyuntu Pulitjamunungka wangkanytjaku. Munu paluru Pulitjamunungka kulu tjaalytju tarapula nyara palunyatjara wangkanytjaku wiyatu ngaranyi. Paluru putu nyupalila kampa kutjarangka ngaranyi, palula munu nyuntula. Palu uti paluru ngururpa ngarama, munu kutjarangka nyupalilanguru kulintjatjanungku tjukurpa palunyatu wangkama. Munu paluru uti tjukurpa uwankara nyuntu wangkanytja kutju purkarangu kulira tjukurpa palunyatu Ingkilitjangku wangkama Pulitjamunungku uti kulintjaku, munu ngapartji tjukurpa uwankara Pulitjamunungku wangkanytja kutju purkarangu kulira tjukurpa palunyatu nyuntula wangkama nyuntumpa wangkangu nyuntu kulu uti kulintjaku paluru wangkanytja.
31. *Ara nyangangu nyuntula ngapartji nyaa wangkanyi?*
32. Tjinguru nyuntu Ingkilitjangku rapangu wangkapai munu nyuntu wangkanyangka uti kulilpai. Nyara palulanguru nyuntu mukuringkula Pulitjamunungka walytjangku Ingkilitjangku wangkanytjaku ngaranyi.
33. Palu kutjupa-ara Pulitjamunungku Ingkilitja wituwitu wangkapai. Tjinguru paluru nyuntula tjapilku, ka nyuntu putu nguwanpa kulilku paluru wangkanyangka munu nyuntu kampa kutjupa ngunti kulilku tjukurpa kutjupa.
34. Palu uti nyuntu Ingkilitja putu kulirampa Pulitjamunu tjapila angangu kutjupaku ankula ngurintjaku pitjala nyupalila ngururpa ngarala kampa kutjaranguru utira wangkanytjaku.

35. Ka ngayulu taipi nyangangka wangkara wiyaringkunyaangka nyuntu tjinguru watjalku, "Wiya palya, ngayulu mukuringkunyaangka wiya kutjupangu pitjala ngalila ngurupa ngarala kampa kutjarangu ngalila kutjarangka utira wangkanytjaku." Alatji tjinguru nyuntu mukuringkula wangkaku. Palu malangka tjinguru Pulitjamunungku nyuntula wangkanyangka nyuntu tjukurpa kutjupa tjuta putu nguwanpa kulilku. Nyara palula-arangka nyuntu uti Pulitjamunungka wangkama alatji, "Ngayulu tjukurpa nyuntu wangkanyangka putu nguwanpa kulini, panya Ingkilitja kutjupa tjuta wituwitu nguwanpa ngaranyi. Wanyutju tjukurpa kampa kutjarangu ara uwankara utira wangkapainya mantjila ngayunya wangkara alpamilantjaku!" Ka nyuntu alatji tjapinnyangka Pulitjamunu kutjupangu ankula ngurintjaku ngaranyi pitjala nyuntunya wangkara alpamilantjaku, ka uti Pulitjamunu panya paluru rawangu nyuntula tjapintja wiyangu wantima munu patara nyinama paluru pitjanytjaku.
36. **Kuwari nyanganga ara malatjalta nyuntula wangkara utini ara nyanga nampa 4-nguru, panya Pulitjamunungku nyuntula tjapintja tarapula nyanga palunyatjara.**
37. *Tjukurpa ara nyangangu nyaa wangkanyi Pulitjamunungka?*
38. Pulitjamunungku nyuntula tjapilku tarapula nyara palunyatjara munu paluru wangka uralku taipirikuutangka uwankara nyupali wangkanytja, nyuntu munu Pulitjamunungku. Tjinguru nyuntu mukuringkula tjapinnyangka tjakultjungkuku tarapula nyara palunyatjara, munta tjinguru nyuntu wantiku paluru tjapinnyangka tjakultjunkuwiwangu munu pilunpa kutju nyinaku. Palatja palya, nyuntumpa pilunpa nyinanytjaku ngaranyi. Palu nyuntu wangkara aluntja wiyangu wantinyangka Pulitjamunungku rawangu kutju nyuntula tjapilku tjukurpa kutjupa kutjupa tjuta, panya Pulitjamunuku nyiringka tjukurpa tjuta ngaranyi paluru tjana nyuntula tjapintjaku, ka Pulitjamunungku tjukurpa palunya tjananya wantinytja wiyangu nyuntula rawangu kutju tjapilku tjukurpa uwankara.
39. *Ka ara nyangangu nyuntula ngapartji tjukurpa nyaa wangkanyi?*
40. Pulitjamunungku nyuntula tarapula nyanga palunyatjara tjapinnyangka nyuntu kutju ngurkantankunytjaku ngaranyi nyanga kutjarangu:
 1. Nyuntu mukuringkula tjinguru palula wangkanytja wiya pilunpa nyinanytjaku ngaranyi.
 2. Munta tjinguru nyuntu mukuringkula palula wangkanytjaku ngaranyi.
41. Ka Pulitjamunungku nyuntunya wangkara wituwituntjaku wiya ngaranyi nyuntu palula tjakultjungkunytjaku tarapula nyara palunyatjara. Ka anganu panya tjukurpa kampa kutjarangu utira wangkapaingku kulu uti nyuntunya wituwituntja wiyangu wantima waarpungkula nyuntu wangkanytjaku. Palu uti nyuntunku walytjangku kulinma Pulitjamunungka wangkanytjikitjangku, munta tjinguru wantira pilunpa nyinanytjikitjangku. Munta tjinguru nyuntu mukuringkula nyuntumpa malpangka wangkaku nyupali warangu wangkara kulintjikitjangku munun palulangurulta kulilku Pulitjamunungka wangkanytjikitjangku tarapula nyanga palunyatjara, munta tjinguru nyuntu wantira pilunpa nyinaku wangkanytja wiya.

42. *Tjinguru nyuntu kulilku wangkawiya pilunpa nyinanytjikitjangku, ka palulanguru nyaaringkuku?*
43. Wiya, nyuntu pilunpa nyinanyangka Pulitjamunungku nyuntunya kura kulintja wiya. Munu paluru nyuntumpa mirpanarira pauntjingara wangkanytja wiyangku wantiku nyuntu wangkawiya nyinanyangka. Ka ngula wati panya ngurkantankupailu panya kuutpangka kuranyu nyinapailu nyuntumpa mirpanarira nyuntunya kuranmankunytja wiyangku wantiku nyuntu panya Pulitjamunungka wangkanytja wiyangku wantinytjitjanguru.
44. Palu nyuntu wangkara aluntja wiyangku wantinyangka Pulitjamunungku nyuntula rawangku tjapilku. Panya Pulitjamunuku nyiringka tjukurpa tjuṭa ngarinyi nyuntula tjapintjaku, ka paluru tjukurpa palunya tjananya uwankara nyuntula tjapilku wantinytja wiyangku. Munu paluru nyuntu wangkanyangkampa taipirikuutangka nyuntumpa wangka uralku nyupalinku wangkanytja. Palu nyuntu tjinguru wangkanytja wiya pilunpa nyinanytjikitja mukuringkula nyuntu wangka Pulitjamunungka nyanga alatji, "Ngayulu wangkanytja wiyangku wantinyi!" Ka palatja palya. Panya nyuntu wangka wiya nyinanytjaku ngaranyi alatjitu.
45. *Palu tjinguru nyuntu kulilku Pulitjamunungka wangkanytjikitjangku tarapula nyanga palunyatjara. Ka palulanguru nyaaringkuku?*
46. Uwa, nyuntu tjinguru tarapula nyanga palunya Pulitjamunungka tjakultjunkunytjikitja mukuringkunyaangka paluru nyuntula ara tjuṭa mulapa tjapilku munu nyupalimpa wangka uralku taipirikuutangka nyupalinku wangkanytja. Munu palula malangka uwankara tjapira wiyaringkula paluru taipinguru nyiringka wakatjunkuku tjukurpa uwankara nyupali wangkanytja, munu ngula nyiri palunya kuutpakutu katiku nyara kuutpangka nyinapai tjuṭangku tjukurpa nyuntumpa nyakula kulintjaku. Ka wati ngurkantankupaingku panya kuutpangka kuranyu nyinapailu nyiri panya palulanguru tjukurpa uwankara riitamilalku munu palulanguru nyuntumpa tjukurku nintiringkula paluru tjukururungku kulilku nyuntunya ngurkantankunytjikitjangku.
47. **Uwa, ara nyanga kutjara-kutjara ngayulu wangkara utigu nyuntu uti kulintjaku.**
48. **Munupa kuwari ara palunya tjananya nyuntula tjapini kutju-kutju nyuntu kulira Pulitjamunungka ngapartji wangkanytjaku. Palya? Ara mankurpaga nyuntula tjapini, ka nyuntu kulira Pulitjamunungka wangkama nyuntu mukuringkunyta, tjinguru uwa, tjinguru wiya. Palya?**
49. Nyangatja Pulitjamunungku nyuntunya witiṛa kanyini ngura nyangangka, kana palulanguru nyuntula ara nampa 1 tjapini alatji:
 - 1) *Nyuntu angangu kutjupangka ringamilara tjakultjunkunytjikitja mukuringanyi nyuntu nyangangka nyinanytja? Munta tjinguru wiya?*
50. Tjinguru nyuntu mukuringkulampa Pulitjamunungka wangka munu angangu nyara palumpa ini kulu wangka. Palu wiyangkampa Pulitjamunungka wangka tjukurpa Ingkilitjangku alatji, 'No!'
51. Taipi ngaratjura munu kulira Pulitjamunungka wangka!

APPENDIX 6B — 2015 NT POLICE CAUTIONS — ENGLISH TRANSLATION OF
PITJANTJATJARA

A recorded version of the NT police caution in Pitjantjatjara can be heard at <https://www.youtube.com/watch?v=t7oBB4INrql&feature=youtu.be>. The English translation is shown below:

ENG001a – Standardised Audio Police Caution (SAPC) – English front-translation – in custody

Recording 1: FOR A PERSON IN CUSTODY

1. Listen carefully to this story.
2. The Police think that maybe you broke the law.
3. That's why the police arrested you and brought you here.
4. You cannot leave unless they say that you can leave.
5. When the police talk to you about this trouble, the police must follow two laws carefully.
6. Listen carefully to these two laws.
- 7. Law number 1 says this:**
8. The police cannot keep you here secretly.
9. If you want to talk to your family, or maybe a friend, tell the police.
10. Then you can ring them and tell them where you are.
11. That is what law number 1 says.
- 12. Law number 2 says this:**
13. Maybe the police will ask you many questions about this trouble.
14. Maybe they will ask you to show them something about that trouble.
15. If you don't want to say anything to them or show them anything, that's ok.
16. The police cannot force you to say anything about that trouble. They cannot force you to show them anything.
17. The Police will record your story - everything you say and everything you show them.
 - a. Police might take your story to court and the judge and other people in Court can listen to your story and hear you talking.
 - b. They will listen to your words to decide if you did break the law or if you didn't break the law.
18. That is what law number 2 says.
19. This recording is finished now.
20. You can tell the police what you want to do.

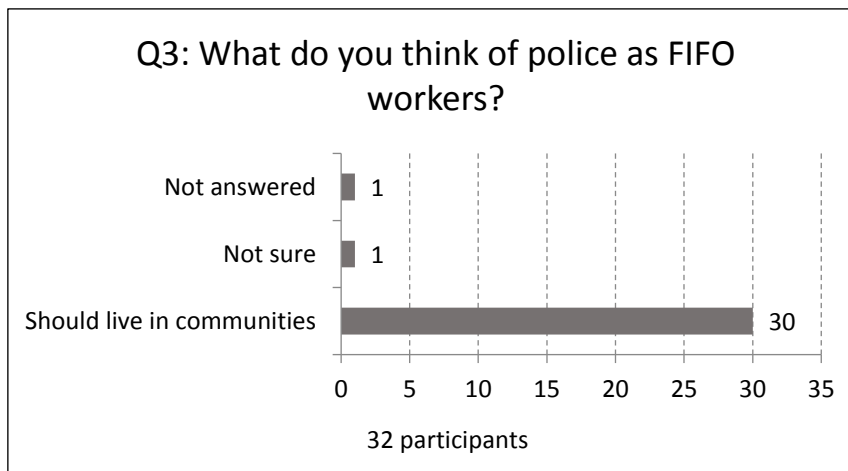
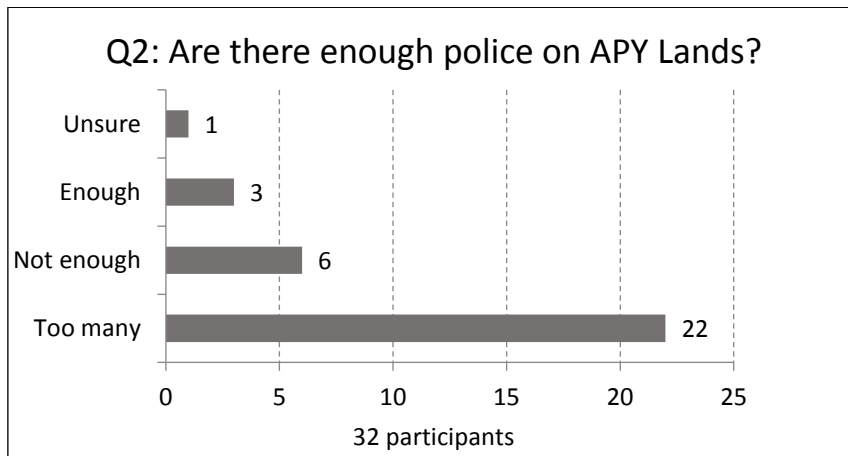
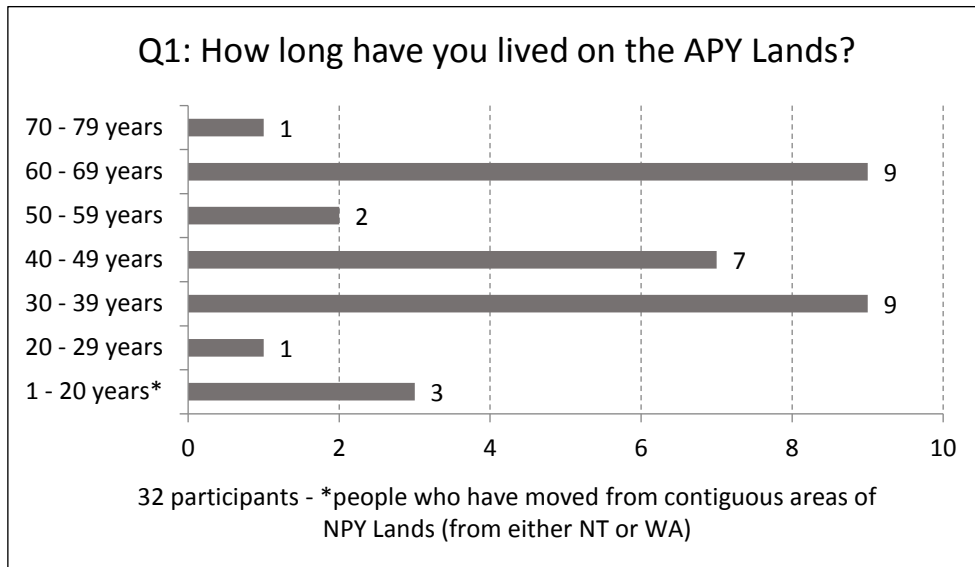
ENG001b – Standardised Audio Police Caution (SAPC) – English front-translation – not in custody

Recording 2: FOR A PERSON NOT IN CUSTODY

1. Listen carefully to this story.
2. The Police think that maybe you broke the law.
3. That's why the police asked you to come here.
4. The police cannot make you stay here. You can leave if you want to leave.
5. When the police talk to you about this trouble, the police must follow the law carefully.
6. Listen carefully to the law.
7. The Law says this:
8. Maybe the police will ask you many questions about this trouble.
9. Maybe they will ask you to show them something about that trouble.
10. If you don't want to say anything to them or show them anything, that's ok.
11. The police cannot force you to say anything about that trouble. They cannot force you to show them anything.
12. The Police will record your story - everything you say and everything you show them.
 - a. Police might take your story to court and the judge and other people in Court can listen to your story and hear you talking.
 - b. They will listen to your words to decide if you did break the law or if you didn't break the law.
13. That is what the law says.
14. This recording is finished now.
15. You can tell the police what you want to do.

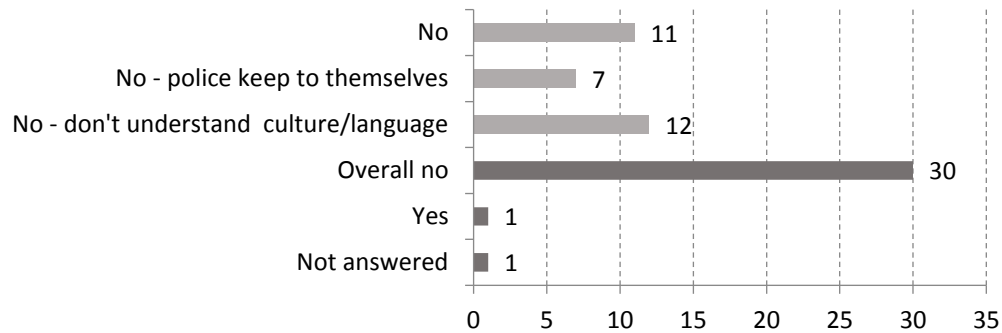
APPENDIX 7 — 2016 ANANGU SURVEY RESULTS

Part A



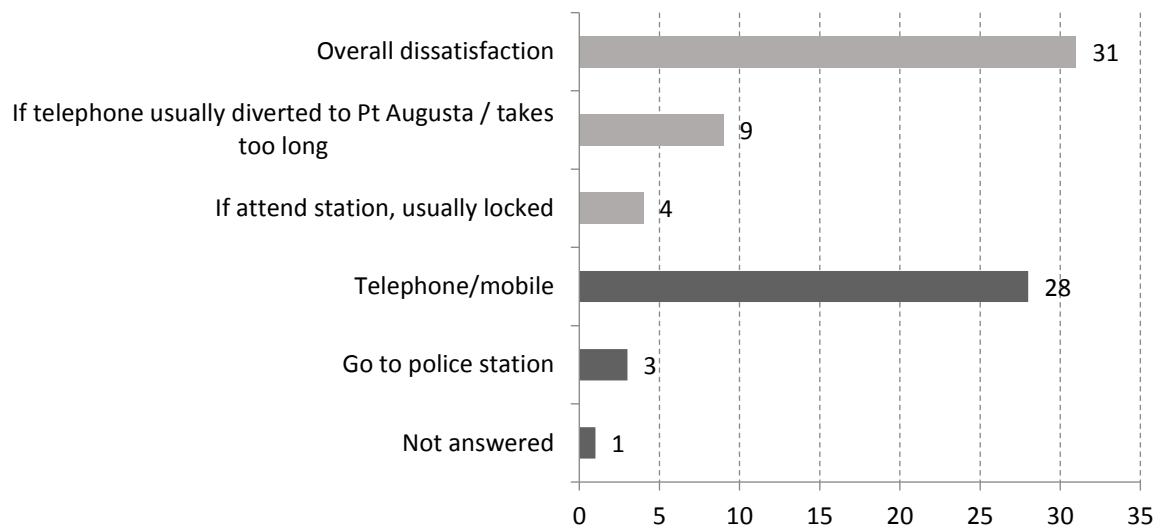
Appendix 7

Q 4: Do you see police as part of your APY community?



32 participants. Dark colour = primary answer; lighter shade = volunteered additional information

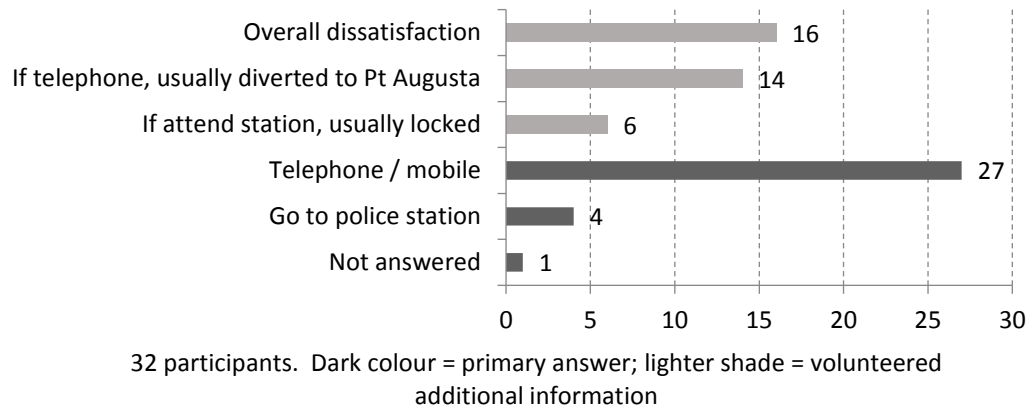
Q 5: How do you contact police during business hours?



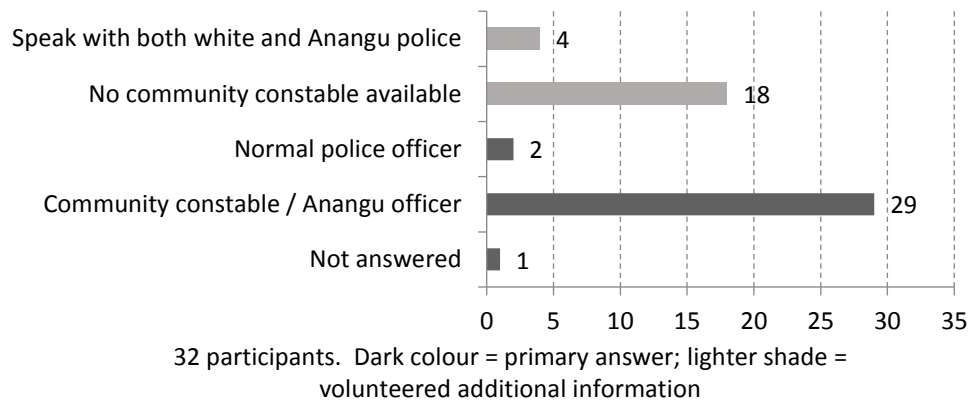
32 participants. Dark colour = primary answer; lighter shade = volunteered additional information

Appendix 7

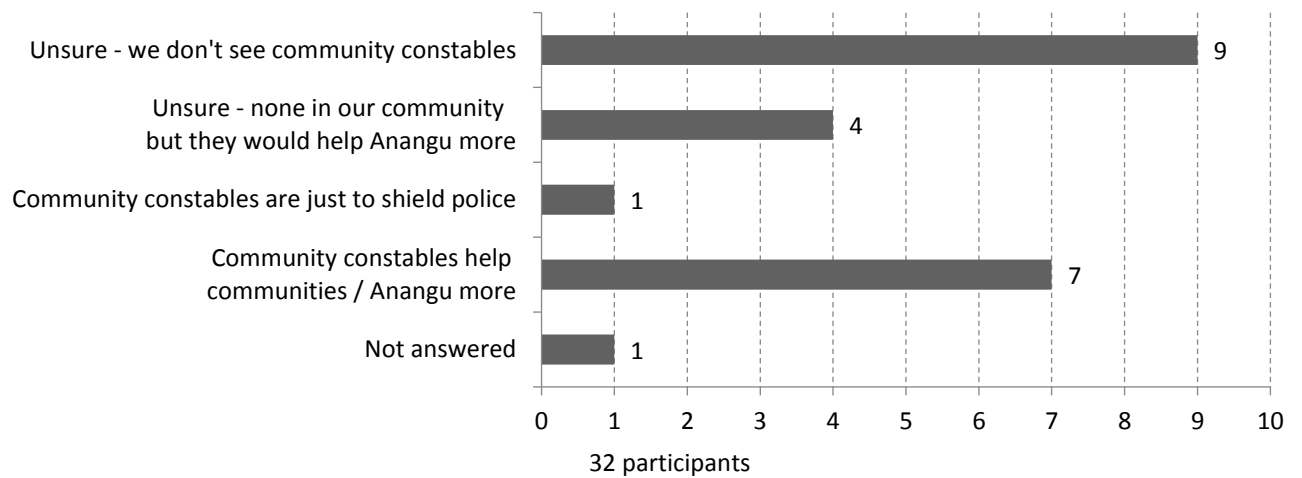
Q 6: How do you contact police outside business hours?



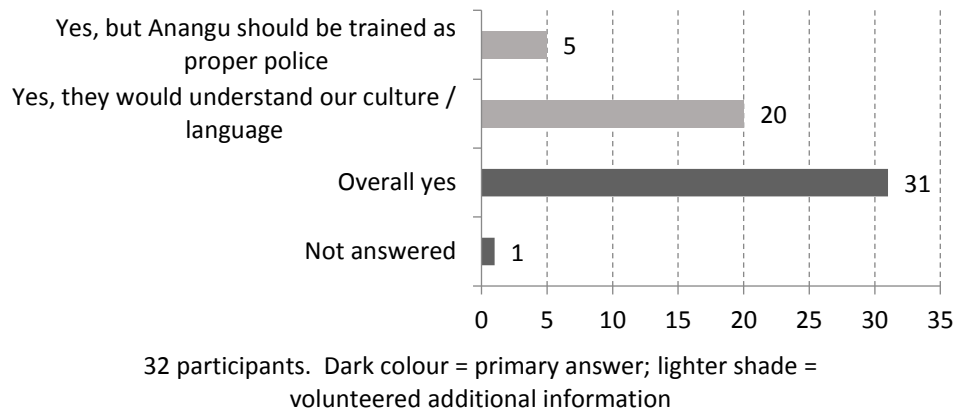
Q 7: Would you prefer to contact a community constable or normal police officer for problems?



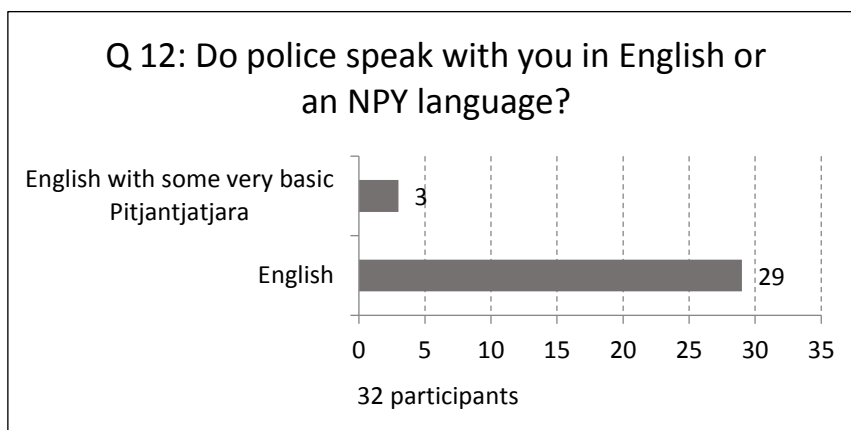
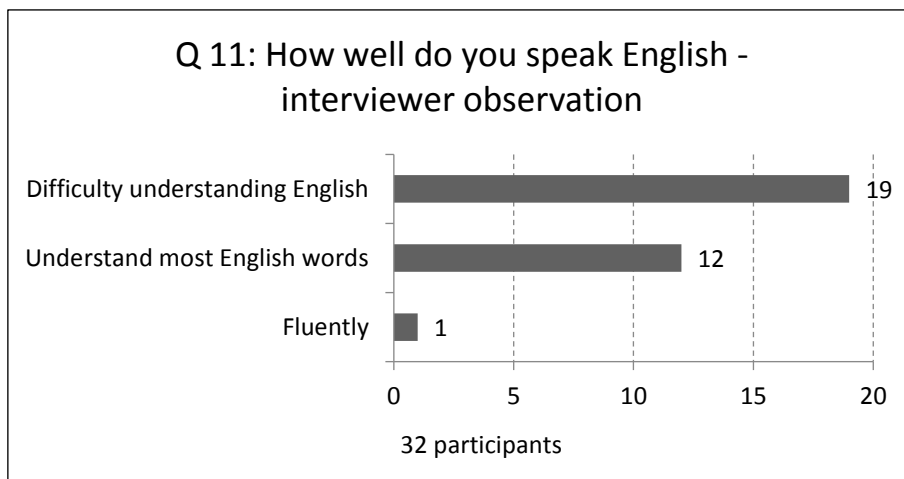
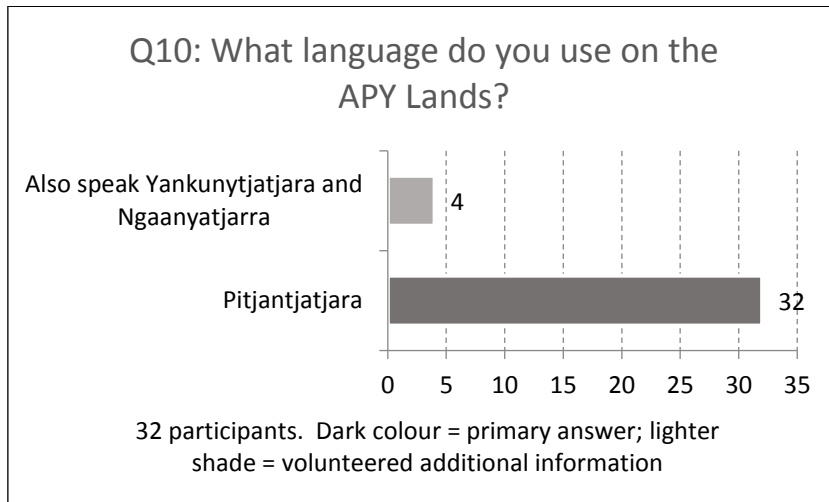
Q 8: How do community constables differ from normal police on the Lands?



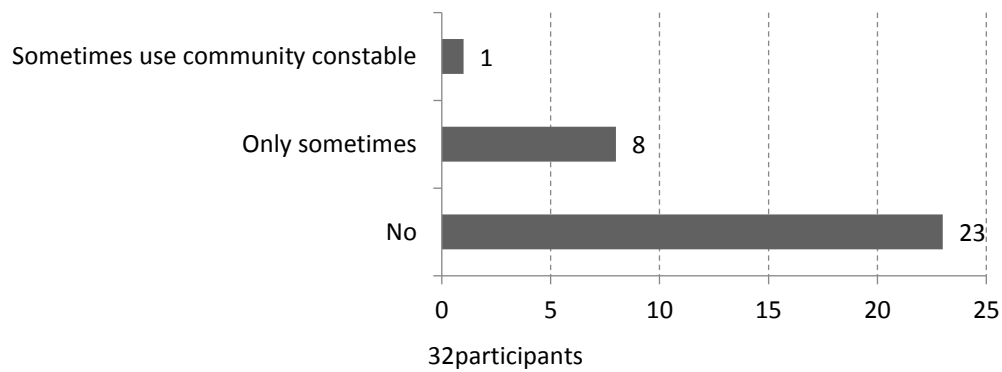
Q 9: Would you like to see more Anangu community constables on the Lands?



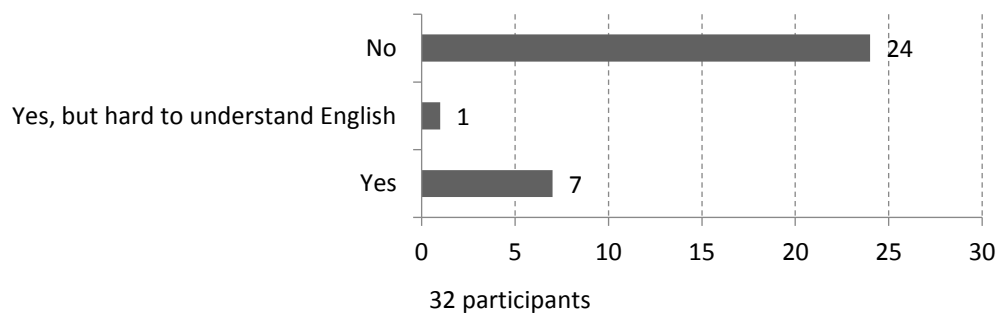
Part B



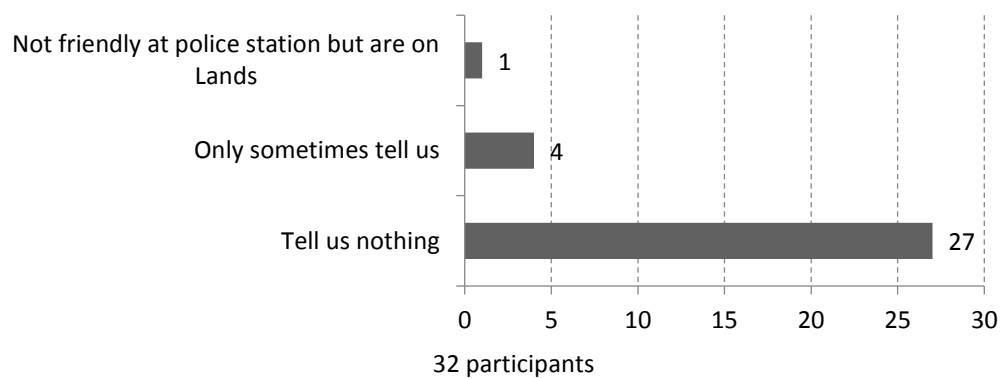
Q 13: Do police use an interpreter when they speak to you about police business?



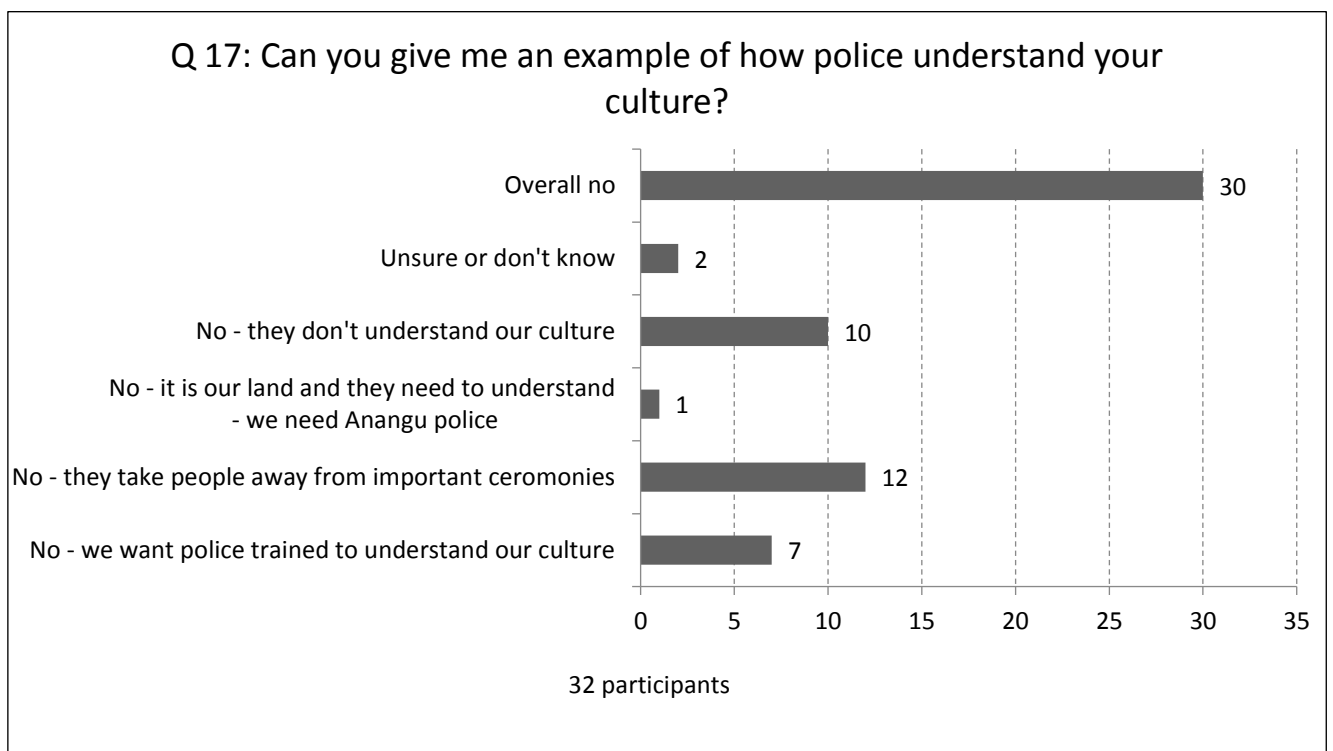
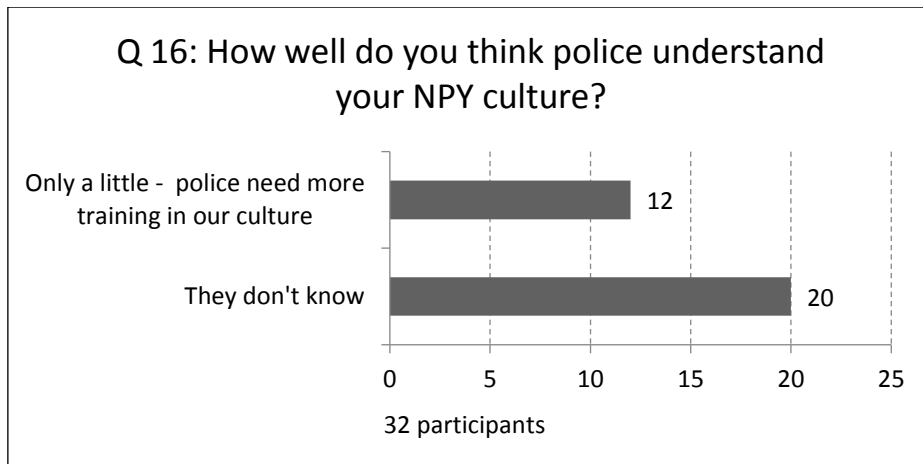
Q 14: Do you know what rights you have when police talk to you?



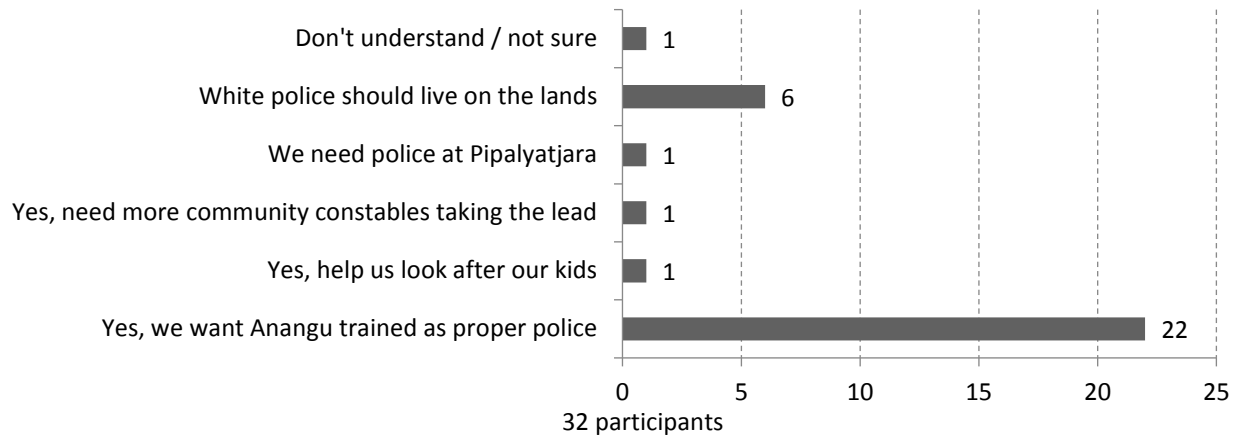
Q 15: What do the police tell you about your rights?



Appendix 7

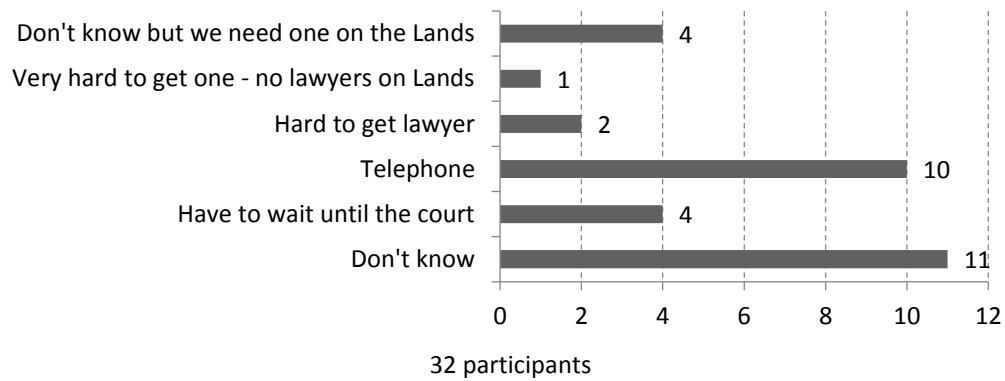


Q 18: Would you like to see a different type of policing on the Lands - if so, what would it look like?

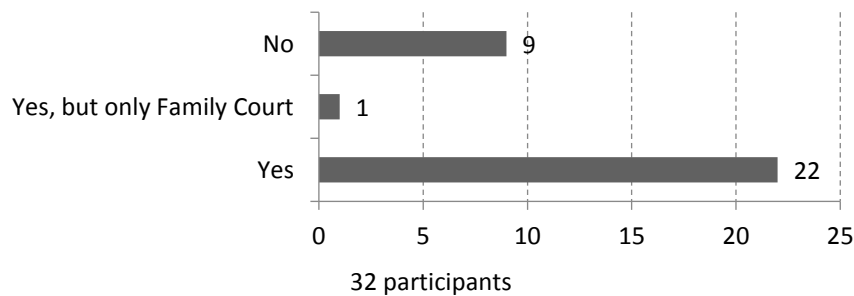


Part C

Q 19: If you need a lawyer, how do you get one?

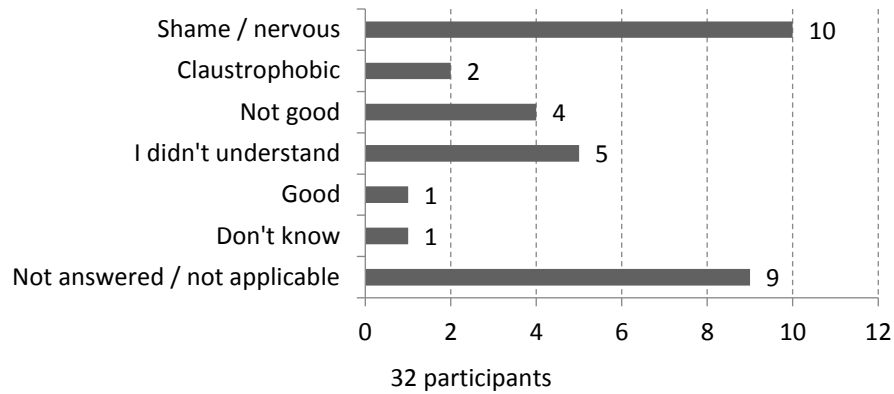


Q 20: Have you ever been before a Magistrates Court on the APY Lands?

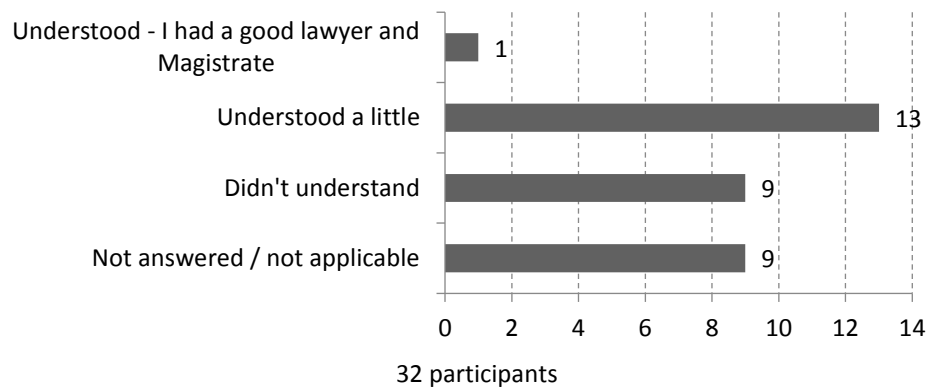


Appendix 7

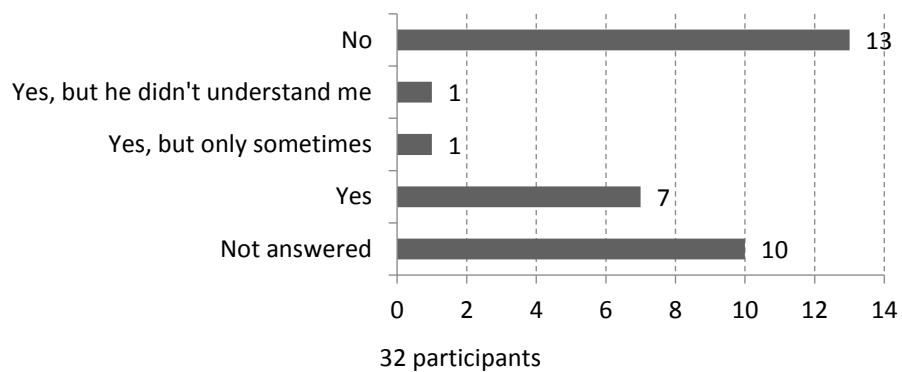
Q21: How did you find that experience?



Q 22: How much did you understand about what was going on in the Court?

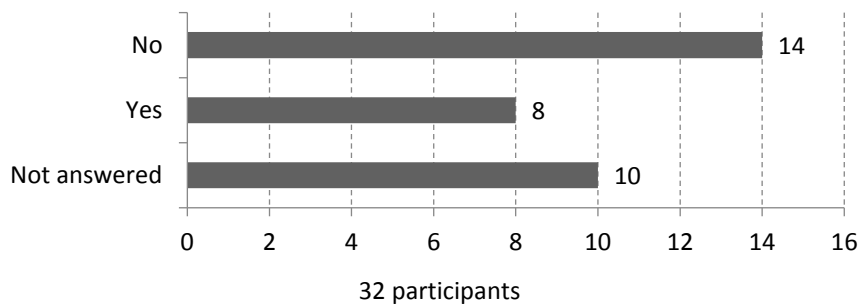


Q 23: If you have been to court, did you have an interpreter with you?

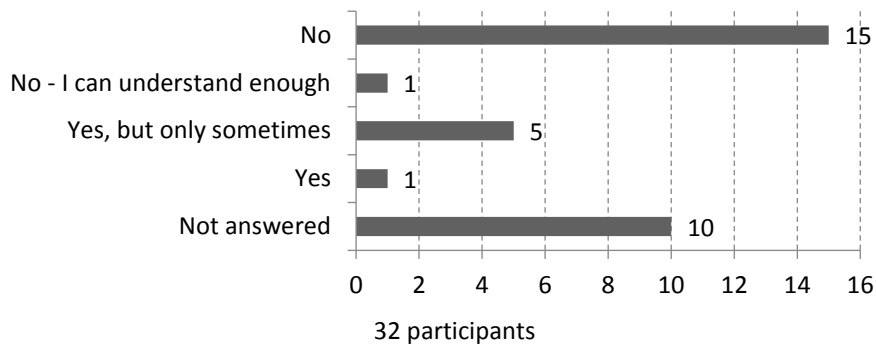


Appendix 7

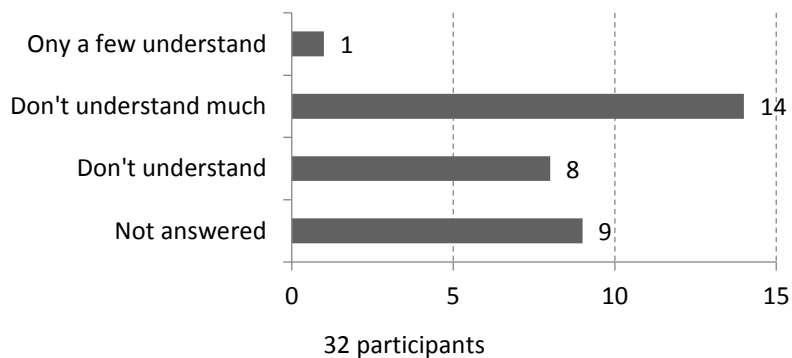
Q 24: If you have been to Court, did you have a friend or member of your family with you?



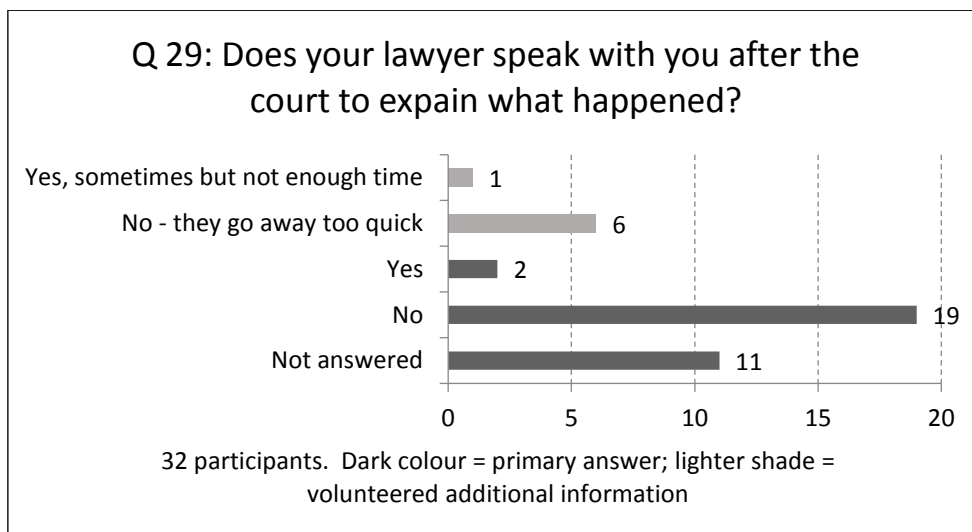
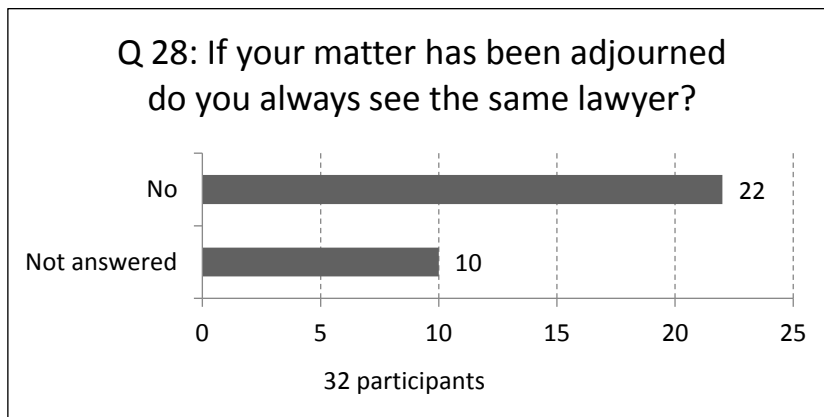
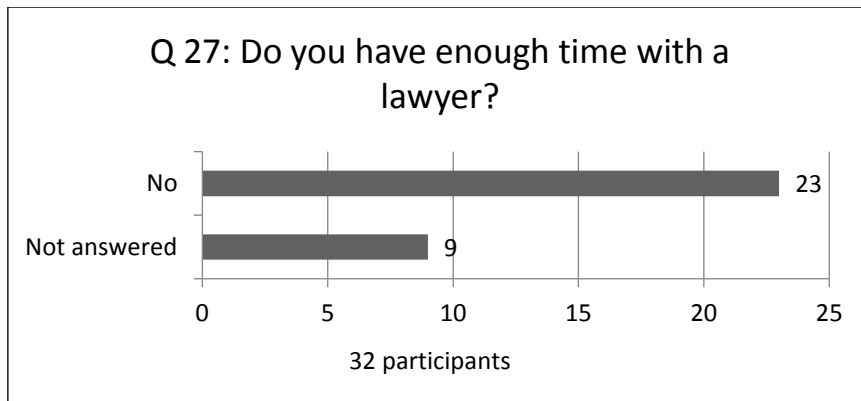
Q 25: Do lawyers use and interpreter when they speak with you?



Q 26: How much do you think the lawyers understand your culture?

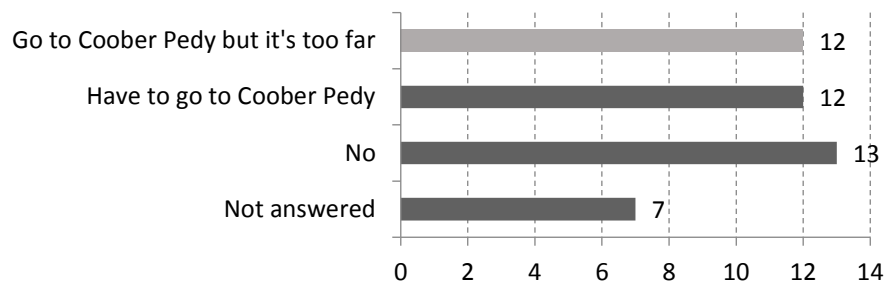


Appendix 7



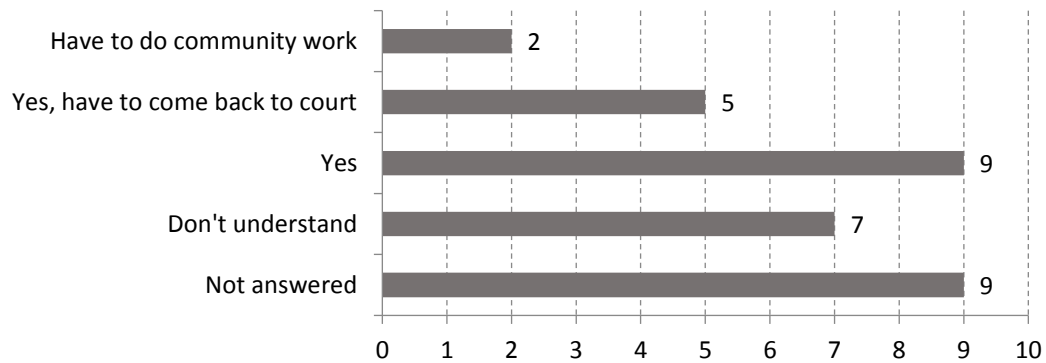
Appendix 7

Q 30: If you want to plead not guilty do you know what happens?



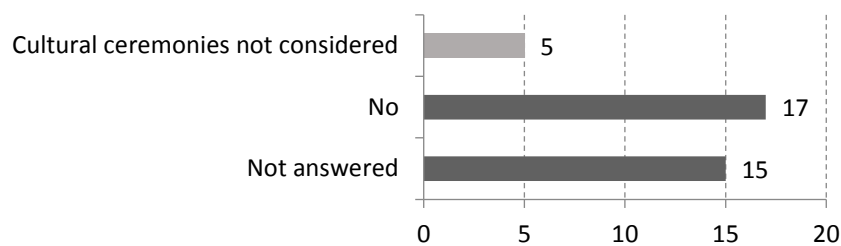
32 participants. Dark colour = primary answer; lighter shade = volunteered additional information

Q 31: If you get bail, do you know what happens?



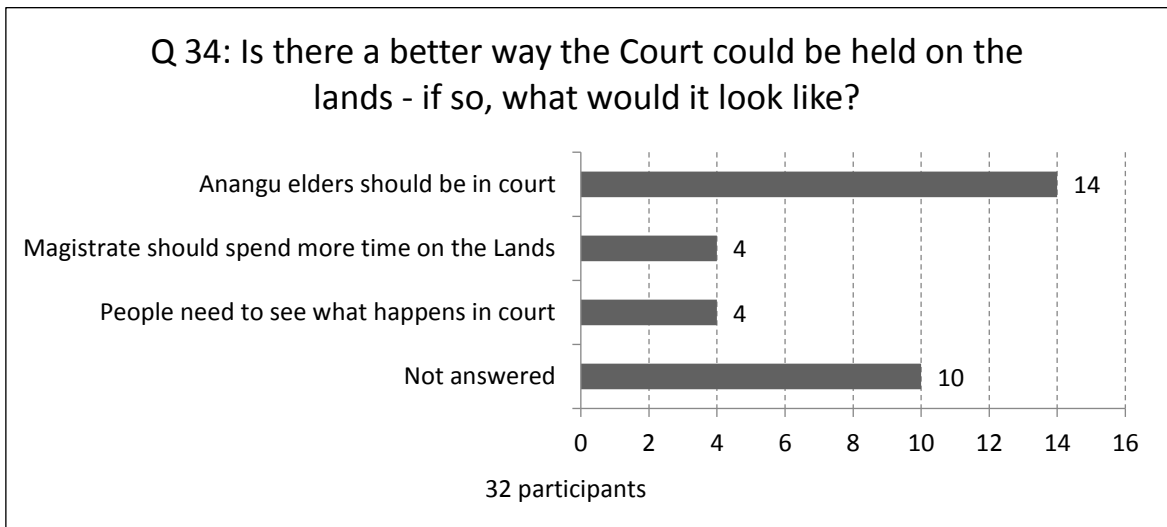
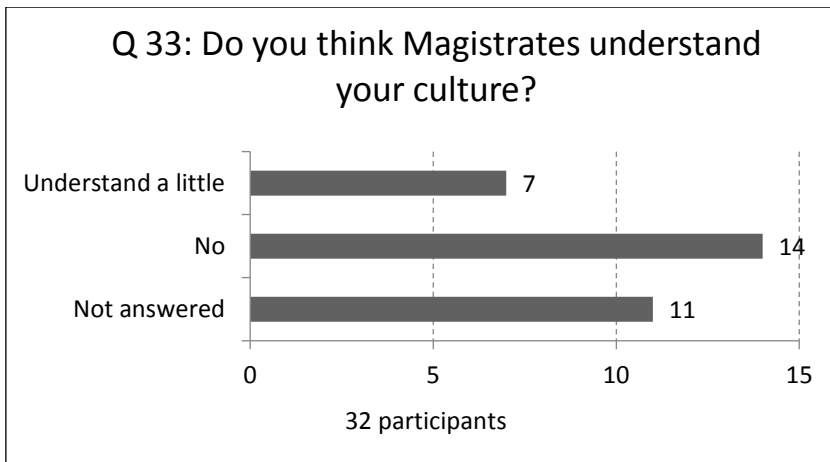
32 participants.

Q 32: If you have been released on bail, were your cultural obligations taken into account?

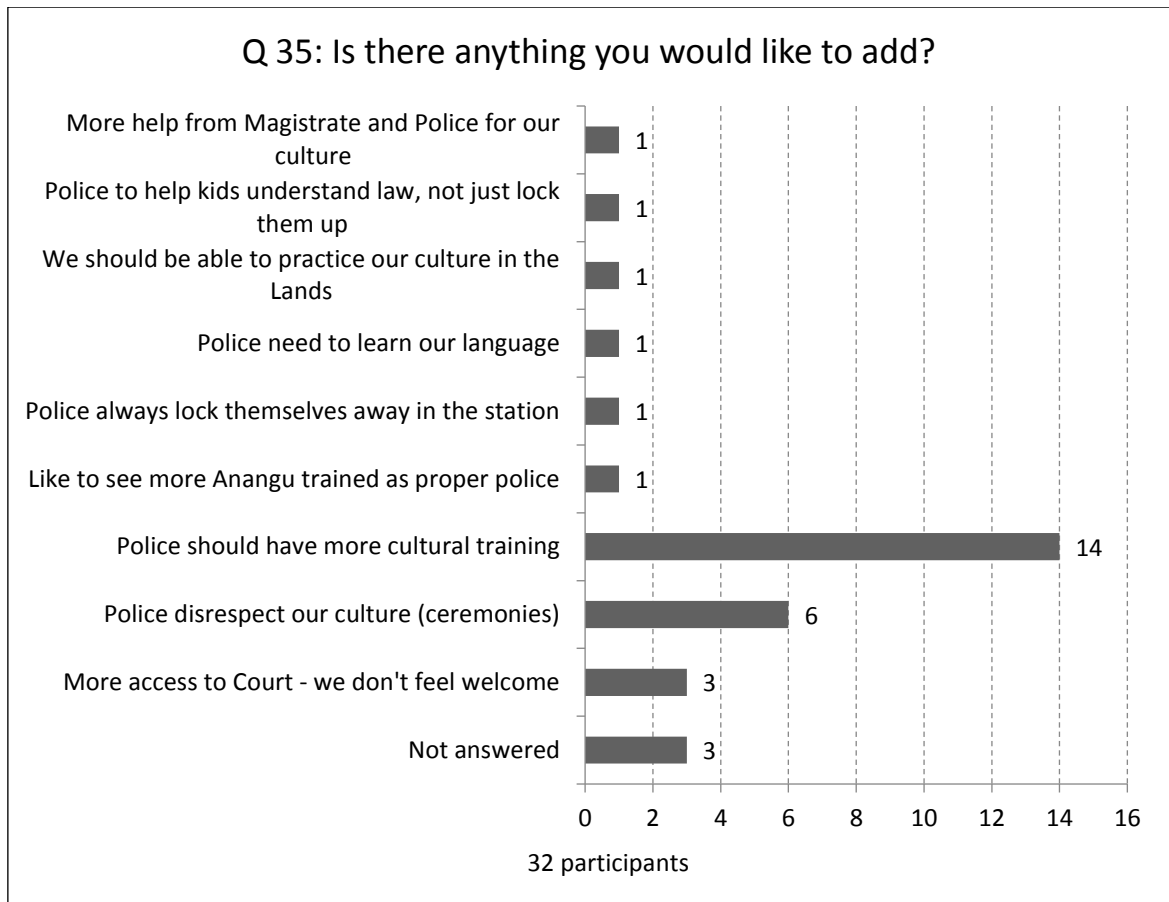


32 participants. Dark colour = primary answer; lighter shade = volunteered additional information

Appendix 7



Appendix 7



End of survey

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